91-7

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. SHOULD JUDGE COFFRIN HAVE RECUSED HIMSELF FROM HEARING THE MOTION FOR RELIEF FROM JUDGMENT BASED ON HIS ASSOCIATIONS WITH VERMONT AND NEW JERSEY BANKS AND WITH ROBERT OPEL AND JOHN OPEL, THE CHIEF EXECUTIVE OFFICER OF IBM?

2. SHOULD PETITIONER BE GRANTED RELIEF FROM FINAL JUDGMENT AND A NEW TRIAL, PURSUANT TO RULE 60(b)(6) OF FEDERAL RULES OF CIVIL PROCEDURE BECAUSE A REASONABLE PERSON WOULD QUESTION JUDGE COFFRIN'S IMPARTIALITY TO SIT ON THE CASE IN LIGHT OF HIS ASSOCIATIONS WITH VARIOUS VERMONT AND NEW JERSEY BANKS, JOHN OPEL AND ROBERT OPEL?

3. SHOULD SECOND CIRCUIT COURT JUDGES CARDAMONE AND TIMBERS HAVE RECUSED THEMSELVES FROM SITTING ON THE THREE JUDGE PANEL AS THEY AND THEIR WIVES ARE SUBSTANTIAL STOCKHOLDERS IN IBM AND THE THRESHOLD QUESTION IN THE APPEAL WAS WHETHER IBM HAS AN INTEREST OF MILLIONS OF DOLLARS IN THE OUTCOME OF THIS CASE?

4. WHETHER THE DECISIONS BELOW ARE INCONSISTENT WITH AND IN CONFLICT WITH THE HOLDINGS IN *LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.*, 486 U.S. 847, 100 L.Ed. 2d 855, 198 S. Ct. 2194 (1988) AND THE SEVENTH CIRCUIT IN *UNITED STATES V. MURPHY*, 768 F.2d 1518 (7th Cir. 1985), REGARDING WHEN A JUDGE SHOULD RECUSE HIMSELF FROM SITTING ON A CASE.

LIST OF ALL PARTIES

The parties in this action in the Court below were William L. Crow Construction Company, Plaintiff-Respondent; Richardson Engineering Company and Harry A. Richardson, Defendants; and Richardson Engineering Company, Defendant-Appellant. Although International Business Machines Corporation (IBM) is not a named party, it does have a substantial interest in the outcome of this case.

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No. _____

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RICHARDSON ENGINEERING COMPANY,

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vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richardson Engineering Company (hereinafter referred to as "RECO"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 1, 1991.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Second Circuit, not reported, appears in the Appendix to this Petition. (3a) The Order denying a rehearing en banc, entered April 2, 1991 is also unreported and appears in the Appendix A. The opinion and order of the

United States District Court that resulted in the Appeal to the Court of Appeals was entered on September 10, 1990. (6a)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1991. Within the time prescribed by Rule 40 of the Federal Rules of Appellate Procedure, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied by the Court of Appeals on April 2, 1991. This petition for certiorari is being filed within the 90-day period provided by 28 U.S.C. § 2101 and Rule 13 of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves 28 U.S.C. § 455(a) & (b). This statute is set forth in Appendix H. (69a)

STATEMENT OF THE CASE

This action is an Appeal from an Opinion and Order entered in the United States District Court for the District of Vermont, denying Defendant-Appellant, Richardson Engineering Company (hereinafter "RECO") Motion to Recuse and Motion for Relief of Judgment Order which requested a new trial.

This matter arose out of the construction of a building for International Business Machines (hereinafter "IBM") in Essex Junction, Vermont between 1979 and 1981. Appellee-Plaintiff, William L. Crow Construction Company (hereinafter "Crow") filed a Complaint in the Vermont Superior Court which was subsequently removed to the United States District Court for the District of Vermont on February 20, 1981. RECO answered and counter-claimed on February 25, 1981. Subsequent amended pleadings filed by Crow on August 21, 1984 added Harry A. Richardson, Jr. as a defendant. Partial summary judgment was granted Crow on January 30, 1987. A trial by jury was begun on June 9, 1987 and ended in a mistrial being declared on June 11, 1987. A new trial by jury began on February 9, 1988. On April 13, 1988, an order was entered granting judgment for Crow in the amount of $546,375.00 and against RECO, together with interest of $477,456.89 and $1,247,098.20 as an award of attorneys fees, for a total of $2,270,930.09 and granting judgment for Harry A. Richardson, Jr. against Crow.

RECO filed a Notice of Appeal on September 7, 1988. The Judgment was affirmed by the Court of Appeals on February 3, 1989. RECO's Motion for a Rehearing and Hearing En Banc was denied by the Court of Appeals on March 28, 1989. The Court of Appeals mandate issued April 7, 1989. RECO's petition for a writ of certiorari was denied by the United States Supreme Court on October 2, 1989.

On May 29, 1990, RECO filed a Motion for Relief of Judgment Order under Federal Rules of Civil Procedure 60(b)(6) and a separate Motion for the Trial Judge to Recuse himself from hearing the Motion for Relief from

Judgment. Both Motions were denied on September 10, 1990. Appellant RECO filed a Notice of Appeal on October 5, 1990. The Judgment was affirmed by the Court of Appeals on February 1, 1991. RECO's Motion for a Rehearing and Hearing En Banc was denied by the Court of Appeals on April 2, 1991.

STATEMENT OF FACTS

On or about June 29, 1979, Crow agreed to be the general contractor for IBM for a project to construct, for IBM's benefit, a semiconductor manufacturing building with related utilities. Said building was to be part of the IBM complex of manufacturing facilities located in Essex Junction, Vermont.

Crow and IBM selected RECO as the mechanical contractor and RECO's subcontract was approximately $10,000,000.00 During the course of the job, disputes arose over costs RECO incurred due to numerous changes in the work, design errors, design development, design omissions, constructive acceleration and other problems.

When RECO had completed 92% of its work as certified to by IBM's agents, it was terminated. This lawsuit arose over the alleged contract breaches and costs involved.

IBM and Crow have an Indemnification Agreement on this project which leaves IBM liable to pay any judgment RECO receives against Crow on its counterclaim. (37a) IBM's financial interest in the outcome of this litigation is thus direct and identical with Crow's.

RECO has alleged a close relationship between the Honorable Albert W. Coffrin, the trial judge, and John Opel, the Chief Executive Officer of IBM.

This included a Florida vacation of the two families on the eve of the second trial. Judge Coffrin had granted RECO's motion for a mistrial on the first trial. RECO's motion for a mistrial was based primarily on the fact that IBM employees and stockholders had been seated on the jury over the objections of RECO. Judge Coffrin agreed to bar IBM employees and stockholders from the second jury because of IBM's prominent role in the case. (Trial Transcript Vol. 3, 6/11/87).

The association between Judge Coffrin and John Opel was never disclosed to RECO by Judge Coffrin. RECO had no actual or constructive knowledge of the relationship until February of 1990, when it received a letter from the law firm of Robert Opel, the son of John Opel, which advised RECO that Robert Opel was Judge Coffrin's law clerk while *Crow v. RECO* was before him. (40a)

The undisclosed intimate association between Judge Coffrin and the family of the CEO of IBM, which has an interest in the outcome of this case of millions of dollars, is just the type of situation that would cause a disinterested person knowing all the facts to harbor a reasonable doubt as to the impartiality of Judge Coffrin as set forth by the Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 100 L.Ed. 2d 85, 108 S. Ct. 2194 (1988), the Seventh Circuit in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), and the Second Circuit

in *Belfiore v. New York Times Company*, 826 F.2d 177 (2d Cir. 1987).

In this case, Judge Cardamone, Judge Timbers and Judge Meskill were designated to hear the oral argument at the Second Circuit.

RECO moved to recuse Judge Cardamone as his Financial Disclosure Reports filed in 1988, 1989 and 1990 indicated that he and his spouse were substantial stockholders in IBM, whose interest in the outcome of this case, as alleged by RECO, is direct and identical with Crow's.

The motion further requested that any other Judge who is a stockholder in IBM recuse himself. Said motion was denied.

RECO subsequently learned that Judge Timbers' Financial Disclosure Reports filed in 1989 and 1990 also indicate that he and his spouse are substantial shareholders in IBM. Judge Timbers and Judge Cardamone's Financial Disclosure Reports filed in April and May of 1991 show they held IBM stock while this case was before the Second Circuit.

RECO respectfully submits that the main issue in this case is whether IBM has a direct and identical interest to Crow in the outcome of *Crow v. RECO* and whether Judge Coffrin's undisclosed close relationship with the family of John Opel, the Chief Executive Officer of IBM, was of such a nature that he should have recused himself at the trial court level, and whether RECO is entitled to a new trial.

Under such circumstances, RECO respectfully submits that:

1. Judge Cardamone and Judge Timbers should have recused themselves from sitting on the case under 28 U.S.C. § 455(a) and (b); and

2. The Second Circuit departed from the holding in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) that a social relationship of the sort between Judge Coffrin and the Opel family implies extensive personal contact which would cause an objective observer to doubt the ability of the Judge to act with utter disinterest and aloofness; and

3. The Second Circuit has misapplied the holdings in *Liljeberg v. Health Services Acquisition Corp.*, supra, in regard to 28 U.S.C. § 455.

An en banc hearing was suggested by Appellants, as consideration by the full court was necessary to secure and maintain uniformity of its decisions and because the proceeding involves a question of exceptional importance.

Judge Coffrin also never disclosed that he is a stockholder in five New Jersey and Vermont Banks which played a prominent role in the case, adversarial to RECO. Judge Coffrin was aware that First Fidelity Bank, in which he is a stockholder was in litigation with RECO during the pendency of the case. These stockholdings should have been disclosed to RECO, so that RECO would have had the opportunity to move for recusal at the time.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF JUDGES.

IBM has a substantial interest in the outcome of this case which is directly tied to, and identical with, Crow's interest. This is apparent in this case because:

1. On the first day of the first trial 6/9/87, RECO's attorney advised Judge Coffrin that IBM had an interest in the outcome of this case in the amount of millions of dollars (Trial Transcript Vol. 1, p. 6-10). This notification to Judge Coffrin of IBM's financial interest was briefed before Judge Timbers and Judge Cardamone (11/27/90, p. 5 and 1/11/91, p. 3) and was read into the record at oral argument. (65a)

2. The Indemnification Agreement between IBM and Crow on this matter provides in paragraph 5 that IBM is liable on a crossclaim for any judgment RECO obtains against Crow on its counterclaim in this case. (37a) Therefore, IBM has a direct financial interest in the outcome of *Crow v. RECO* through this Indemnification Agreement. This interest of IBM was briefed before Judge Timbers and Judge Cardamone (11/27/90, p. 6).

3. IBM's attorneys attended and participated in the Settlement Conference immediately before the Trial. RECO briefed that IBM would not have participated in the settlement discussions if it had no financial interest in the outcome of this litigation (11/27/90, p. 10, and 11/11/91, p. 4). IBM's involvement in the Settlement

Negotiations was known or should have been known to Judge Coffrin.

4. Crow's attorneys represented IBM in several interrelated and interdependent cases before Judge Coffrin during the pendency of *Crow v. RECO*. This was briefed by RECO (11/27/90, p. 11, and 1/11/91, p. 3).

5. The IBM/Crow contract for this project calls for IBM to pay acceleration costs that were incurred by Crow for support services provided by RECO on the job. A major part of RECO's Counterclaim was for acceleration costs for which the jury found Crow liable to RECO. However, Judge Coffrin then barred RECO's damage expert from testifying as to the amount of those damages.

6. IBM and Crow had a cost saving arrangement and were partners under Article 7.4.1 of the IBM/Crow Contract. That provision provided that IBM and Crow would share any savings if the Contract came in under the guaranteed maximum cost. IBM was to obtain 75% of all cost savings under the Guaranteed Maximum price. This was briefed (11/27/90, pp. 6, and 10) and (1/11/91, p. 4) and was presented at oral argument. (53a)

7. Judge Coffrin himself described IBM's role in the case as "prominent" (Trial Transcript Vol. 3, 6/11/87, p. 4). RECO objected in writing and verbally to the seating of IBM employees and stockholders on the jury (Trial Transcript Vol. 1, 6/9/87, p. 7). Judge Coffrin certainly knew that IBM had a substantial interest in the case when he granted a mistrial three days into the first trial based in part on RECO's Motion that an IBM employee was then seated on the jury (Trial Transcript Vol. 3, 6/11/87, pp. 1-28). Judge Coffrin exhibited his knowledge that IBM

had a substantial interest in the outcome of the case when he himself barred IBM employees from sitting on the jury for the second trial. These matters were briefed before Judge Timbers and Cardamone (1/11/91, p. 3).

8. Judge Coffrin was also made aware of the parallel interests of IBM and Crow during the trial of an interrelated case of *Vermont Heating, Inc. v. IBM*, Civil Docket 81-69, U.S. District Court for the District of Vermont. This matter was tried before Judge Coffrin and Harry A. Richardson, President of RECO, testified as a "hostile witness" on October 12th through October 14th, 1982. IBM's attorney described Mr. Richardson as "essentially an adverse party" to IBM in which Judge Coffrin agreed.

Based upon the above eight criteria, RECO submits that an objective person would find that IBM does have a substantial interest in the outcome of the *Crow v. RECO* litigation.

A reasonable person, knowing all the facts, would harbor a doubt as to the abilities of Judges Cardamone and Timbers to impartially adjudicate this appeal. RECO filed a Motion to Recuse Judge Cardamone and any other judge owning stock in IBM.

The threshold issue for the three-judge panel of the Second Circuit was to decide whether IBM had a substantial financial interest in the outcome of this case. RECO submits, that because the Judges are substantial stockholders in IBM, they should have recused themselves based upon 28 U.S.C. § 455(b). The fact that these Judges rendered a decision that IBM does not have an interest in

the outcome of *Crow v. Richardson* does not absolve them of their duty to recuse.

The question of public confidence and the impartiality of the judiciary is of exceptional importance for that is what our system of due process and an independent judiciary is based upon. As Judge Lumbard, in his dissent in *In re: Drexel Burnham, Lambert, Inc.*, 861 F.2d, 1307 (2nd Cir. 1988) at pp. 13-20 stated " . . . it has been the custom of Federal Judges in the Second Circuit and elsewhere to recuse themselves whenever they or their spouses hold any stock or have any financial interest of any kind, however small, in any company or enterprise which is a party, or is linked with any party, in any matter coming before them."

Clearly granting a Writ is required to reassert the fundamental principles of Section 455(a) and (b). A Writ of Certiorari is the most appropriate and expeditious course which will cause the least damage to the public perception as to the impartiality of the judiciary.

THE SECOND CIRCUIT HAS DEPARTED FROM THE SUPREME COURT'S HOLDING IN *LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.*

Going to the merits of the Court's decision by Judge Timbers, Cardamone and Meskill, they found that "in no instance does RECO allege a direct or financial interest on the part of Judge Coffrin such that recusal would be appropriate." The Court has departed from the holding by the Seventh Circuit in *United States v. Murphy*, 768 F.2d

1518, that an intimate friendship of a Judge may be grounds for recusal.

In the case of *Murphy*, a question of the Judge's recusal under Section 455(a) was raised because the Judge and the prosecuting attorney in a criminal matter, vacationed together with their families. In that case, the Seventh Circuit found that an objective observer would doubt the ability of a Judge to act with disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation. A social relationship of this sort implies extensive personal contact between the Judge and prosecutor, perhaps a special willingness of the Judge to accept and rely on the prosecutor's representations (Brief 1/11/91, p. 7). RECO submits that a reasonable person would perceive partiality on learning of the close ties between John Opel and Judge Coffrin, especially in light of the timing of the vacation. The Florida vacation occurred between the times of the first and second trials and on the eve of the second trial.

It is respectfully submitted that the circumstances of the relationship between Judge Coffrin and John Opel, when viewed by a reasonable person, is essentially akin to the relationship of the Judge and prosecutor in *United States v. Murphy*. *Murphy* was not given a new trial but only because his lawyer knew of the judge's relationship with the prosecutor and waited until after the trial to move for recusal. No such situation is presented in the case at bar.

A reasonable person would find that IBM does have a substantial interest in the outcome of this case. A reasonable person would further find that Judge Coffrin and John Opel, the President, Chairman of the Board, and Chief Executive Officer of IBM, had more than a casual relationship and that they and their families vacationed together in Florida shortly before the second trial. A reasonable person, therefore, would find that Judge Coffrin, under 455(a), should have recused himself. Therefore, RECO should be entitled to a new trial.

As RECO does allege a direct financial interest in the case by IBM, which interest is identical to Crow's, even though IBM is not a named party, it is a party with a direct interest in the outcome of the *Crow v. RECO* case. The fact that IBM has a direct and identical financial interest with Crow was known or should have been known to Judge Coffrin. There is nothing remote or speculative about IBM's interest which amounts to millions of dollars.

In *Liljeberg v. Health Services Acquisition Corp.*, supra., Loyola University was not a named party to the litigation. However, Loyola had an interest in the outcome of the litigation, just as IBM has a financial interest in the case at bar.

In *Liljeberg*, the Supreme Court found that the Judge's association with the University as a Trustee required recusal, even in the absence of the Judge's actual knowledge of that interest. In the case at bar, Judge Coffrin's close association with the family of the CEO of IBM was clearly known to the Judge. Judge Coffrin also knew or should have known of the interest of IBM in the outcome

of the litigation. This is precisely the type of appearance of partiality that 28 U.S.C. 455(a) is designed to avoid and the type of situation that *Liljeberg* addressed.

A granting of a Writ of Certiorari is appropriate because of the Court has either departed from or misapplied the holding of *Liljeberg v. Health Services Acquisition Corp.*, supra. The facts as set forth above, do show a basis that Judge Coffrin was required to recuse himself under 28 U.S.C. § 455(a).

CONCLUSION

Judge Coffrin's association with John Opel, the President and Chief Executive Officer of IBM, created an appearance of partiality because IBM has a substantial interest, in millions of dollars, in the outcome of this litigation.

Therefore, pursuant to 28 U.S.C. § 455, and Rule 60(b)(6) of Federal Rules of Civil Procedure, Defendant-Appellant RECO should be awarded a new trial. The three-judge panel, in affirming the Trial Court's Order, departed from the holding in *Liljeberg v. Health Services Acquisition Corp.*, supra.

Therefore, granting a Writ of Certiorari is appropriate.

Furthermore, because the primary issue in the case was whether IBM had a substantial interest in the outcome of this case, Judge Timbers and Judge Cardamone, who RECO has learned are stockholders of IBM, should have recused themselves. Because the impartiality of the

judiciary is of exceptional importance, a granting of a Writ of Certiorari is appropriate. Upon rehearing, RECO should be awarded a new trial.

DATED this 28th day of June, 1991.

Respectfully Submitted,

/s/ Kevin P. Candon

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APPENDIX

Appendix A – Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing Filed April 2, 1991 ..... 1a

Appendix B – Order of the United States of Appeals for the Second Circuit Affirming Judgment of the District Court Filed February 1, 1991 ..... 3a

Appendix C – Opinion and Order of the United States District Court for the District of Vermont Denying Petitioner's Motion for Relief of Judgment and Motion for Recusal 6a

Appendix D – Indemnification Agreement Between William L. Crow Construction Company and International Business Machines Corporation 37a

Appendix E – Letter of Stephen C. Walke, Jr., to Mr. Harry Richardson of February 5, 1990 ..... 40a

Appendix F – Petitioner's Motion to Recuse Before the United States Court of Appeals of January 25, 1991 ..... 41a

Appendix G – Transcript of Oral Argument Before the United States Court of Appeals for the Second Circuit of January 30, 1991 ..... 49a

Appendix H – Text of 28 U.S.C. § 455 ..... 69a

APPENDIX A

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of April, one thousand nine hundred and ninety-one.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Plaintiff-Appellee,

– V. –

RICHARDSON ENGINEERING COMPANY,

Defendant-Appellant.

DOCKET NUMBER 90-7913

FILED APR 2 1991

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant, RICHARDSON ENGINEERING COMPANY.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX B

(TJM)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the First day of February, one thousand nine hundred and ninety-one.

Present:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Plaintiff-Appellee,

v.

RICHARDSON ENGINEERING COMPANY and HARRY A. RICHARDSON,

Defendants,

RICHARDSON ENGINEERING COMPANY,

Defendant-Appellant,

RICHARDSON ENGINEERING COMPANY,

Counterclaim-Plaintiff,

Docket No. 90-7913

FILED
FEB 1 1991

v.

WILLIAM L. CROW
CONSTRUCTION COMPANY,

Counterclaim-Defendant.

This is an appeal from a judgment of the United States District Court for the District of Vermont, Coffrin, *J.*, denying Richardson Engineering Company's motion to recuse and motion for relief of judgment requesting a new trial.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

It was entirely proper for Judge Coffrin to have considered the 60(b) motion in the first instance. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied sub nom. Milken v. SEC*, 109 S.Ct. 2458 (1989); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

Going to the merits of Richardson Engineering Company's (RECO) motion, none of the alleged bases for recusal presents the appearance of partiality that 28 U.S.C. § 455 is designed to avoid. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). In no instance does RECO allege a direct of financial interest, rather than a speculative or remote interest, on the part of Judge Coffrin such that recusal would be appropriate. *See Drexel Burnham*, 861 F.2d at 1313.

RECO's reliance on *Hardy v. United States*, 878 F.2d 94 (2d Cir. 1989), is misplaced. We never reached the merits in *Hardy* because the motion was untimely.

For the foregoing reasons the judgment of the district court is affirmed.

/s/ Wm H. Timbers
William H. Timbers, U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

William L. Crow Construction Company	:	
v.	:	Civil Action
Richardson Engineering Company	:	File No. 81-63
Richardson Engineering Company	:	FILED
v.	:	SEP 10, 1990
William L. Crow Construction Company	:	

OPINION AND ORDER

Plaintiff William L. Crow Construction Company (Crow) commenced this action against Richardson Engineering Company (RECO) in Chittenden Superior Court on January 29, 1981. It was removed to this court by RECO on February 20, 1981, and assigned to Judge Coffrin's docket. Counterclaims were filed by RECO against Crow on February 25, 1981. Harry A. Richardson (Richardson) was added as a party defendant on August 16, 1984. Crow's Motion to Dismiss Count II of RECO's counterclaim was granted *inter alia* on December 2, 1986. Crow's Motion for Partial Summary Judgment with respect to delay, interference or acceleration damages set out in Counts I and III of RECO's counterclaim was granted on January 30, 1987, but denied as to Count IV (*quantum meruit*). Following a mistrial on June 11, 1987, trial commenced on February 9, 1988 and concluded on March 18, 1988. Judgments for Crow against RECO and

for Richardson personally against Crow were entered on April 13, 1988.

All post trial motions having been heard and disposed of, RECO appealed to the Second Circuit Court of Appeals on September 7, 1988. Crow appealed on September 21, 1988, but withdrew its appeal September 23, 1988. The judgment was summarily affirmed by the Court of Appeals on February 3, 1989. *See* 873 F.2d 1436 (table). RECO's motion for rehearing and hearing en banc was denied by the Court of Appeals on March 28, 1989. The Court of Appeals mandate issued on April 7, 1989. RECO's petition for a writ of certiorari was denied by the United States Supreme Court on October 2, 1989. *See* 110 S. Ct. 83.

On May 29, 1990 RECO filed a motion for Relief of Judgment Order under Federal Rule of Civil Procedure 60(b)(6) and a separate motion for the trial judge to recuse himself from hearing the Motion for Relief of Judgment. Both motions are denied.

Background[1]

This action arises out of a contractual dispute. The parties are Crow, the prime contractor for a building being constructed for International Business Machines Corporation (IBM) in Essex Junction, Vermont, and RECO, which had subcontracted with Crow for the mechanical work on the project. IBM was not a party. Crow eventually terminated its subcontract with RECO

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[1] Additional background material appears in the discussion section, *infra*.

for numerous on-the-job defaults by RECO which, as found by the jury, included: (1) failure to pay federal, state and payroll taxes; (2) becoming insolvent; (3) diverting progress payments to be held in trust for stated purposes to other uses; (4) making false certification that it had paid all persons supplying labor, material and services on the project; and (5) violating contractual lien waiver payments. Crow's action sought damages from RECO and Richardson individually for the expense of completing RECO's work. RECO by counterclaims sought to recover damages for delay, additional work and defamation.

Trial preparations, including discover, were protracted. All pretrial motions were under the supervision of Magistrate Jerome J. Niedermeier from July 13, 1982, when the matter was referred to him, to February 21, 1986, when it was returned to Judge Coffrin. Discovery was extensive. Numerous potential witnesses were deposed at length, and hundreds of documents were produced.[2] Trial was estimated by counsel to take between three and four months.

The first trial commenced on June 9, 1987 and ended in a mistrial on June 11, 1987.[3] The second trial was

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[2] Crow alone identified some 1,552 potential trial exhibits, many containing multiple additional documents.

[3] As the record discloses, the mistrial was the cumulative result of a number of unfortunate events including (1) the court's late decision to bifurcate the trial and try the liability aspects separately from damages, (2) inappropriate and irrelevant voir dire questions and remarks in opening statement by RECO's counsel relative to the size of the respective parties, (3)

(Continued on following page)

bifurcated. Trial of the liability issues commenced on February 9, 1988 before a twelve-member jury (six regular and six alternate jurors), and concluded on March 7, 1988. Trial of the damage issues commenced on March 8, 1988, and concluded on March 18, 1988. As previously noted, judgments for Crow against RECO, and for Richardson personally against Crow, were entered on April 13, 1988.

Robert Opel served as one of Judge Coffrin's two law clerks from August 2, 1982 to July 29, 1983. Judge Coffrin met various members of Robert Opel's family, including his parents, during his term as law clerk. Sometime later, members of the Coffrin and Opel families met socially upon occasion. Judge Coffrin is a depositor and owns stock in various Vermont banks. He also owns stock in a New Jersey bank in which Richardson may have had an interest at one time and RECO may have had one or more business accounts.

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the unexpected but relevant introduction into evidence by Crow of the complaint in a pending action brought in November 1983 by RECO against IBM in the New York Supreme Court for Westchester County, (4) the court's failure to recognize the need in this particular case to resolve issues involving the authentication and identification of exhibits in advance of trial, (5) the loss of three members from the ten-person jury panel by the third day of a trial expected to last three or four months.

Discussion

A. General Observations

RECO obviously is a disappointed, disgruntled and obviously bitter litigant which failed to prevail on the merits following a lengthy and complicated trial.[4]

Both parties were capably represented throughout this protracted litigation by able and experienced counsel. RECO, apparently unwilling to accept the factual and legal conclusions reached by the court and jury, as affirmed by the Court of Appeals, seeks a new trial claiming an appearance of impropriety, newly discovered, on the part of the presiding judge involving several nonparties to the litigation. These nonparties were IBM and various local Vermont Banks as well as a New Jersey bank. As will be pointed out, neither the judge, IBM, nor the banks, including the Burlington Savings Bank, had any interest based on known information that would be affected by the outcome of this case.

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[4] RECO was a closely-held family business in which Richardson was the President and principal stockholder. Richardson was also a litigant in his individual capacity. Richardson, however, prevailed at trial on Crow's claim against him as an individual and therefore lacks standing to pursue these motions because he has no personal stake in their outcome. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

B. Procedural Considerations

1. Standing

Crow argues that RECO lacks standing to pursue these motions because it is in bankruptcy[5] and whatever rights it has is the property of the bankruptcy estate. *See e.g., Cain v. Hyatt*, 101 B.R. 440, 441-42 (E.D. Pa. 1989) ("[c]ourts have uniformly held that the broad scope of [11 U.S.C.] § 541 encompasses causes of action existing at the time of the commencement of the bankruptcy action"). Since a cause of action becomes the property of the bankruptcy estate, "upon filing a petition for bankruptcy a debtor loses standing to pursue any claims . . . . " *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 856 (D. Minn. 1989).

RECO counters by filing a letter from the bankruptcy trustee's attorneys, dated July 25, 1990, confirming the trustee's authorization to prosecute the instant motion on behalf of the trustees in bankruptcy. *See* Exh. 1 to RECO's Reply Brief, filed July 27, 1990. Although the letter is ambiguous as to whether it was written to Richardson or RECO, and whether RECO actually had the trustee's authorization when the motions were filed, we nevertheless assume RECO's standing for the purpose of deciding the motions.

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[5] An involuntary petition in bankruptcy was filed by RECO's creditors on April 11, 1988. The case was converted into a Chapter 11 proceeding on May 13, 1988 and reconverted to Chapter 7 on January 12, 1989. *See* Docket entries, *In the Matter of Richardson Engineering Co.*, Debtor Case No. 88-02395 (Bankr. D.N.J.)

2. Motion to Recuse

By its motion brought pursuant to Fed. R. Civ. P. 60(b)(6), RECO seeks relief from a Judgment Order granting plaintiff's Motion for Partial Summary Judgment dated January 30, 1987, and from the judgment on a jury verdict entered on April 13, 1988. RECO moves the court to recuse itself from hearing the Rule 60(b)(6) motion because "Judge Coffrin should have recused himself from sitting during the trial of this matter, it falls [sic] that Defendant also requests that Judge Coffrin not hear this motion." Both motions are necessarily interdependent to a degree.

The trial judge has discretion in the first instance to determine whether to disqualify himself. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). In exercising such discretion in this case, the trial judge must make at least a limited determination of the merits of the Rule 60(b)(6) motion because "there are manifold and patent disadvantages in transferring the case to another judge who must familiarize himself with issues already decided." *United States v. International Business Machines Corp.*, 475 F. Supp. 1372, 1377 (S.D.N.Y. 1979), *aff'd, sub nom. In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) (citing *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1977)). The record in the instant case, including the transcript of a six-week trial over 3,000 pages in length, is literally overwhelming. It would be a waste of scarce judicial resources to refer this matter to another judge who, upon review, would find little if any substantive merit to RECO's Rule 60(b)(6) motion. *See National Auto*

Brokers Corp. v. General Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

RECO's claim of an appearance of partiality on the part of the presiding judge under § 455(a) relies for support on an affidavit of Richardson dated May 23, 1990, appended to RECO's Rule 60(b)(6) motion.[6] This affidavit is largely argumentative and fails to recognize the adversarial nature of legal proceedings and the proper role of the court, counsel and parties in such proceedings. Much of the affidavit deals with rulings, real or perceived, made throughout the course of the litigation, including the trial, which were adverse to Richardson. Richardson concludes that the only reason for the adverse rulings must have been bias on the part of the presiding judge.

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[6] An affidavit of Richardson dated August 3, 1990 was also appended to RECO's response to Crow's Brief in Opposition to Defendant's Motion to Recuse and for Relief from Judgment Order filed July 6, 1990. This affidavit suffers from the same failings discussed in the text with regard to Richardson's May 23, 1990 affidavit and for that reason this discussion is equally applicable to the August 3, 1990 affidavit. In addition, the August 3, 1990 affidavit ignores the distinction between factual and legal arguments and conclusions and confuses the purpose for the filing of briefs with the circumstances requiring the need for affidavits. For these reasons and because much of the contents of the August 3, 1990 affidavit is duplicative of the contents of the May 23, 1990 affidavit it will be sparingly referred to hereafter. References throughout this opinion will be to Richardson's Affidavit of May 23, 1990 unless otherwise noted.

While a motion made pursuant to 28 U.S.C. § 144 requires the movant to file a "timely and sufficient" affidavit, § 455 is a self-enforcing statute which does not include such a requirement. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 871 n.3 (1988); *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980). Filing a § 144 affidavit is enough, however, to trigger inquiry into whether a § 455 violation has been implicated. *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). In the context of a Rule 60(b) motion based upon § 455, Richardson's affidavit still "must allege facts sufficient to substantiate his allegation of judicial prejudice . . . . " *Wood v. McEwen*, 644 F.2d 797 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982). Thus, we are guided by the sufficiency requirements of § 144 when determining the adequacy of Richardson's affidavit. *See Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1387-88 (9th Cir. 1988).

It is universally established that "[a]ffidavits based on conclusions, opinions and rumors are an insufficient basis for recusal." *Davis v. Commissioner of Internal Revenue*, 734 F.2d 1302, 1303 (8th Cir. 1984) (per curiam) (citations omitted). *See also Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344, 1348 (2d Cir. 1971) ("[m]ere conclusions, opinions, rumors or vague gossip are insufficient"); *Wood*, 644 F.2d at 802 (affidavit containing "only conclusionary statements and personal opinions" insufficient). Accordingly, a supporting affidavit that contains "conclusory allegations of bias or prejudice without sufficient factual support for the conclusions reached" is inadequate. *United States v. Faul*, 748 F.2d 1204, 1211 (8th Cir. 1985), *cert. denied*, 472 U.S. 1027 (1985). Moreover, while an affiant's assertions of *fact* must

be accepted as true, the court is charged with scrutinizing the legitimacy of any conclusions drawn, i.e., the *legal* sufficiency of the affidavit. *See Hodgson*, 444 F.2d at 1348; *National Auto Brokers*, 572 F.2d at 958; *Davis*, 734 F.2d at 1303; *United States v. Platshorn*, 488 F. Supp. 1367, 1368 (S.D. Fla. 1990). In light of these standards, it becomes evident that much of Richardson's affidavit provides little or no support for his recusal motion. Richardson's approach also ignores the well-recognized principle that bias under § 455(a) must be shown by matters extra-judicial in nature and not based upon in-court rulings. *IBM*, 618 F.2d at 929. It further ignores the preclusive effect of the appellate court's decision on issues raised on appeal as well as all issues which could have been so raised. *See Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (per curiam) (a Rule 60(b) motion cannot be used to collaterally attack an appellate court's prior rulings in the case); *In re Design Classics, Inc.*, 788 F.2d 1384, 1386 (8th Cir. 1986). Whatever motive Richardson ascribes to the presiding judge in making rulings adverse to RECO, the decision to the Second Circuit established the propriety of such rulings as made as a matter of law.

The affidavit also fails to distinguish the relationship between parties to the litigation and nonparties, especially nonparties with no legal interest in the outcome of the controversy and to which reference is made solely as the result of evidence adduced at trial by one party or the other. Additionally, various allegations set out in Richardson's affidavit are not only factually inaccurate but are used to draw inaccurate legal conclusions as well.[7]

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[7] Illustrative examples can be found in Crow's opposition brief at footnotes 5, 7, and 18.

Of those extra-judicial matters to which Richardson alludes in his affidavit, many are outside the ken of the court or knowledge of the presiding judge. Some of these matters are irrelevant to the alleged charges of impropriety and others, if true, nevertheless do not support the allegations because of lack of knowledge by the presiding judge.[8]

In its Rule 60(b)(6) motion, RECO relies upon Richardson's affidavit to establish its § 455(a) appearance of impartiality claim. The allegations of the affidavit, however, are based almost entirely upon "unsupported, irrational or highly tenuous speculation." Such insubstantial

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[8] Representative of one irrelevant (and untrue) matter is found in paragraph 22 of the affidavit which alleges the presiding judge moved Richardson's deposition from Burlington, Vermont to Washington, D.C. so Crow's attorneys could feed him questions by computer. In fact, the presiding judge had never heard of a deposition being conducted by computer until the allegation in the affidavit. Instead, the judge exercised his discretion in permitting a change in location of the deposition because, to that point, most of it had already been conducted in Burlington and moving it to Washington did not inconvenience Richardson who had to travel from his New Jersey home to either Burlington or Washington in any event.

Representative of matters both irrelevant and unknown are affidavit paragraphs 21 dealing with Richardson's settlement discussions with Crow and paragraph 28 detailing RECO's relationship with his attorneys.

Representative of a matter arguably relevant if true but unknown to the presiding judge is the allegation in paragraph 25 of Richardson's Affidavit of August 3, 1990 that IBM and Crow have entered into a collateral indemnity agreement whereby IBM is liable for any judgment obtained by RECO against Crow.

grounds do not warrant the recusal of a judge in a matter such as this. *See In re United States*, 666 F.2d 690, 694 (1st Cir. 1981). To do otherwise would require the presiding judge to abdicate his responsibility not to recuse himself without reason. *In re Drexel Burnham*, 861 F.2d at 1312. In all cases involving a question of disqualification, the proper test is a determination whether a reasonable person viewing the facts objectively would doubt the judge's impartiality. *Id.* at 1309.

> Thus, the test to be applied is an objective one which assumes a reasonable person *knows and understands all the relevant facts*. . . . Like all legal issues, judges determine appearance of impropriety – not by considering what a straw poll of the only partly informed man-in-the-street would show – but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

Id. at 1313 (citations omitted) (emphasis in original).

As discussed hereafter, an examination of RECO'S Rule 60(b)(6) claim in detail clearly establishes that no grounds exist to support the allegations of impropriety on the part of the presiding judge. This being so, it follows that no grounds exist to support RECO's motion to recuse. The merits of RECO's motion to recuse are inextricably connected with the merits of his motion for relief from judgment. That is to say, if there were no grounds for the presiding judge's recusal in the original action, there are similarly no grounds for his recusal with regard to a subsequent Rule 60(b) motion based upon the prior failure to recuse. Accordingly, RECO's motion to

recuse is denied and we turn to RECO's Rule 60(b)(6) claim.

3. Rule 60(b)(6) Motion for New Trial

(a) Timeliness

For the reasons stated in Crow's brief, RECO's motions are time barred under 28 U.S.C. §§ 144 and 455. Notwithstanding, a judgment may be set aside pursuant to Rule 60(b)(6) on the ground of the appearance of impropriety of the presiding judge under 28 U.S.C. § 455(a), provided the basis for such relief is extraordinary. *Liljeberg*, 486 U.S. at 863-64. Rule 60(b) reads in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

The first question to resolve is whether Richardson's motion is properly considered as one made pursuant to clause (2) or clause (6). This is an important issue since a one-year limit applies to the filing of a Rule 60(b)(2) motion, while a Rule 60(b)(6) motion need only be made "within a reasonable time." In *United States v. Cirami*, 563

F.2d 26 (2d Cir. 1977), the Second Circuit explained the relationship between the various parts of Rule 60(b):

> As the language of the rule makes clear, relief under clause (6) is available only when the movant acts in a timely fashion and asserts a ground justifying relief that is not a ground encompassed within any of the first five clauses. While all motions made pursuant to rule 60(b) must be brought "within a reasonable time," the rule specifies that those falling under the first three clauses must, in addition, be brought within a year of the entered judgment. Thus, when the reason asserted for relief comes properly within one of those clauses, clause (6) may not be employed to avoid the one-year limitation.

Id. at 32.

In *Liljeberg*, the Supreme Court recently drew upon its reasoning in *Klapprott v. United States*, 335 U.S. 601 (1949), and observed that "clause (6) and clauses (1) through (5) are mutually exclusive." 486 U.S. at 863 n.11. Accordingly, "[t]he court may treat a motion to vacate a prior judgment as having been made under 60(b)(6) only if the other, more specific grounds for relief encompassed by the rules are inapplicable." *Maduakolam v. Columbia University*, 866 F.2d 53, 55 (2d Cir. 1989). *See also* 7 J. Moore, *Moore's Federal Practice* ¶60,28[2], at 60-317 (1990) (the one-year limitation "may not properly be circumvented by a utilization of any of the other clauses, (4), (5), or (6), which are subject only to a reasonable time limitation, where the reason for relief is embraced within clauses (1), (2), or (3)") (footnotes omitted).

Crow characterizes RECO's Rule 60(b) motion as one based on newly discovered evidence; namely, the opinion

handed down in *United States v. Hardy*, 878 F.2d 94 (2d Cir. 1989), the judge's acquaintance with John Opel, the employment of Robert Opel as the judge's law clerk, and the judge's ownership in certain banks referred to in the course of the trial. If this was evidence that was relevant to issues in the case itself, RECO's motion would be subject to the one-year time limit applicable to Rule 60(b)(2) because judgment in the underlying case was entered on April 13, 1988 and the pending motions were not filed until May 29, 1990. This would be true regardless of the appeal in the case because, if the grounds for a Rule 60(b) motion existed at the time judgment was entered, subsequent appeals do not prevent the one-year filing period from commencing the date judgment is entered. *See* J. Moore, *Moore's Federal Practice* ¶60.28[2], at 60-316 n.20; 21 *Federal Procedure, L. Ed.* § 51-157, at 570 (1984).

However, these items do not constitute newly discovered *evidence* relevant to any issues raised at trial. Instead, they are better characterized as newly discovered *information* which, if substantiated, arguably would have required the presiding judge to disqualify himself from conducting the trial and associated matters in the first instance. We therefore hold that RECO's newly discovered information is not "evidence" for Rule 60(b)(2) purposes and RECO need merely satisfy the "within a reasonable time" requirement of Rule 60(b)(6). *See also Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *United States v. York*, 888 F.2d 1050 (5th Cir. 1989).

In *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983), the Second Circuit discussed the timeliness requirement of Rule 60(b)(6):

> [Rule 60(b)(6)] does not impose a particular time limit, but only requires that the motion be made within "a reasonable time." In considering whether a Rule 60(b)(6) motion is timely, we must scrutinize the particular circumstances of the case, and balance the interest in finality with the reasons for delay.

Id. at 897.

Richardson filed his motion on May 29, 1990, three months after learning about the John and Robert Opel relationship and eleven months after the Second Circuit decided the *Hardy* case. Richardson may not have felt that he had grounds for filing a Rule 60(b) motion based only upon the *Hardy* case. However, he did file his motion only three months after learning about the Opels. The Second Circuit has held that a *four*-month period between the movant's learning of facts that warranted a Rule 60(b)(6) motion and his filing of the motion was "reasonable." *See Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1051 (2nd Cir. 1982). *Compare Cirami*, 563 F.2d at 32 (two and one-half months between discovery of facts implicating 28 U.S.C. § 455 and filing of motion was reasonable) *with PRC Harris*, 700 F.2d at 897 (delay of almost one year was unreasonable) *and Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 656 (2d Cir. 1979) (one-year delay unreasonable).

We conclude that RECO's Rule 60(b)(6) motion was filed in a timely manner and proceed to consider the merits of the motion.

2. Merits

(a) IBM

IBM was not a party nor did it have any interest known to the court in the outcome of this litigation. In this latter regard, Richardson correctly points out in ¶14 of his Affidavit of May 23, 1990, that the construction contract of August 29, 1979 between Crow and IBM contained a clause apportioning construction cost savings between IBM and Crow.[9] The terms of the Crow-IBM contract are incorporated by reference in the RECO-Crow contract and were part of the evidence at trial in that context only. *See* Volume 1, Attachments to Plaintiff's Statement of Material Facts in connection with Crow's Partial Summary Judgment Motion of February 13, 1985. However, ¶7.4.1 was not one of the provisions of the Crow-IBM contract that was relevant to a resolution of the Crow-RECO matter.

It is doubtful, other than stated, that reference to ¶7.4.1 appears anywhere in the record in the instant

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[9] The Crow-IBM contract provided:

> 7.4.1 In the event that the actual audited cost of the work, including base contract fitting up items included in the contract documents is less than the Guaranteed Maximum Cost, the difference representing the savings shall be apportioned ___ to the contractor and ___ to IBM upon final completion of the work. The contractor's share of the savings shall in no event exceed ___.

Art. 7, ¶7.4.1, at 17, Crow-IBM Contract of August 28, 1979.

case.[10] Whether it does or not is not material to this issue, however, because IBM gains nothing by Crow's recovery from RECO of either damages or attorney's fees and expenses. The RECO-Crow contract was for a set price. In other words, upon satisfactory completion of the contract, RECO was to be paid a stated amount. ¶¶3 and 4, RECO-Crow Contract of February 4, 1980.[11]

The contract was terminated by Crow with the work in progress because of defaults by RECO. Crow took over the job to insure its eventual completion and subsequently brought suit to recover the costs it incurred because of RECO's defaults. Had RECO not defaulted and, instead, completed the project, it would have been paid the contract price by Crow. Under the payment arrangement of the contract, cost savings would have inured entirely to RECO and would not have been passed on to Crow in whole or in part. Any cost overruns would have had to be absorbed by RECO without reimbursement by Crow.

With a fixed price contract between RECO and Crow, no cost benefits attributable to RECO would be passed on

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[10] Apart from the Crow-RECO Contract, the record has not been searched by the court to discover whether a reference to ¶7.4.1 is contained therein. If one does exist, it very likely is sufficiently "buried" so that actual or even constructive knowledge would not be imputed to the court.

[11] The subcontract price was $9,272,841. Various adjustments agreed to by the parties increased this price somewhat. Contract payments were to be made to RECO as the work progressed. ¶3. Final payment was due 45 days after full completion of the work by RECO provided certain specified contingencies had been met. ¶4.

to IBM according to the terms of the Crow-IBM contract because all such benefits inured to RECO and not Crow. By the same token, any damages recovered by Crow in the instant action were awarded solely to make Crow whole for such expenditures as it had been required to make because of RECO's default.[12]

(b) Law Clerk

Occasionally, situations arise involving a law clerk serving on a judge's staff that give rise to an appearance of impropriety. Most frequently, this occurs when the law clerk has been offered or accepted future employment with a law firm appearing in a case before the judge. However, it could involve a situation where, for example, the law clerk was related to a party or a known witness, or had a stock ownership in a corporate party. When one of these situations arises, it is the law clerk, not the judge, who is disqualified, and he or she simply does no work on that particular case. *See, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988), *cert. denied*, 109 S.Ct.

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[12] After application of various credits and offsets, the jury awarded damages to Crow in the net amount of $546,376. The court awarded attorney fees to Crow pursuant to paragraph 21(IV) of the RECO-Crow contract of February 4, 1980 in the total amount of $1,247,098. Crow's original itemized claim for attorney fees and expenses was $1,741,441 but it had offered to settle its claim for $1,500,000. A hearing was held on the attorney fee issue on April 8, 1988. No evidence was presented and the parties agreed that the court should determine the reasonableness of the attorney fees. This was done by order of April 13, 1988. The total amount of Crow's judgment including damages, attorney fees, expenses and interest, was $2,270,930.

2066 (1989). This is the appropriate procedure. *See* Advisory Opinion No. 74, Judicial Conference Committee on Codes of Conduct (Oct. 26, 1984). Assuming that the remaining clerk is not disqualified, he or she then works on the matter. In the unlikely event that both clerks should be disqualified with regard to the same case, neither of them becomes involved with it.

Robert Opel was a law clerk from August 2, 1982 to July 29, 1983.[13] During that period of time, the Crow-RECO action was before the magistrate in all respects, having been assigned to him on July 13, 1982 and returned by him to the judge on February 21, 1986. During the period of Mr. Opel's employment, the judge had no involvement with the case whatever and the parties did not appear before him for any reason. Thus, the question of Robert Opel's disqualification was never considered. If, under different circumstances, his disqualification would have been required, Mr. Opel would not have worked on the case. Nothing more would have been required, least of all the disqualification of the presiding judge. We agree with the following observation in *In re*

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[13] Robert Opel was one of two law clerks on Judge Coffrin's staff, each of whom, in common with Judge Coffrin's other law clerks, served slightly staggered one-year terms. At the time of his selection, Judge Coffrin was unaware of any connection between Robert Opel and IBM. In fact, Judge Coffrin was unaware who was president of IBM at that time. Robert Opel was selected entirely on the basis of merit, as reflected by his record and recommendations submitted on his behalf. Robert Opel joined a cadre of past, present and future law clerks who invariably have been bright, skilled, energetic and dedicated. Each one has always had knowledge of, and a strong commitment to, their ethical obligations.

San Juan Dupont Plaza Hotel Fire Litigation, 129 F.R.D. 409 (D.P.R. 1989): "Section 455(a) cannot be drawn so broadly as to make any possible family line between a mammoth case such as this and the judge's chambers, as opposed to the judge himself, automatically fall under the shadow of dubious appearances." *Id.* at 417.

Regardless of the fact that Judge Coffrin was under no obligation to recuse himself because of Robert Opel's service as law clerk, RECO takes the position that the Judge nevertheless had an *obligation* to disclose to RECO that Robert Opel was his law clerk.[14] This assertion is not only wrong, but directly contradictory to a resolution first adopted by the Judicial Conference of the United States in 1971.[15]

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[14]*See* ¶30 of Richardson's "Affidavit" of August 3, 1990.

[15] In all cases involving actual, potential, probable or possible conflicts of interest, a federal judge should reach his own determination as to whether he should recuse himself from a particular case, without calling upon counsel to express their views as to the desirability o his remaining in the case. The too frequent practice of advising counsel of a possible conflict and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable. The Committee approves the procedure suggested by the Interim Advisory Committee in its Opinion No. 20.

Resolution G, Judicial Conference of the United States (June 1990). *See also Hall v. Small Business Admin*, 695 F.2d 175, 180 (5th Cir. 1983) ("[a] judge is required merely to disclose the basis for disqualification, not 'every incident or factual detail

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(c) John Opel

Judge Coffrin and his wife were introduced to Robert Opel's parents during the time that Robert Opel was serving as Judge Coffrin's law clerk. A pleasant family-oriented social relationship, limited in nature, later developed. Contacts were infrequent, however, due to time and distance considerations, particularly during the relevant time period involved with the instant litigation. When there was a get-together, it often involved other members of either one or both families, and when Judge Coffrin and John Opel were together their wives were always present. Business affairs were never a topic of conversation except in the abstract, and the instant case was never discussed.

RECO apparently claims that the friendly social relationship set out above gives rise *per se* to an appearance of impropriety requiring the disqualification of the presiding judge. RECO reaches that conclusion regardless of the fact that neither IBM nor John Opel is a party, nor does either have a known financial interest in the outcome of the litigation. RECO is mistaken. "In short, friendship between judges and trial actors other than parties, untainted by any financial interests, should not generally justify recusal." *M.K. Metals, Inc. v. National Steel Corp.*, 593 F.Supp. 991, 996 (N.D. Ill. 1984). This is so

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which might contribute to the overall impression of partiality' ") (quoting *United States v. Conforte*, 457 F.Supp. 641, 655 (D. Nev. (1978)); *Land Capital Corp. v. Meyers Group, Inc.*, No. 89 Civ. 1403, 1987 WL 13718, slip op. at 1 (S.D.N.Y. July 8, 1987).

even when a judge is acquainted or has a personal friendship with a party. *In re Beard*, 811 F.2d 818, 831 (4th Cir. 1987) (judge's friendship with president of company whose bankruptcy case was pending before judge not a basis for recusal); *In re United States*, 666 F.2d at 696-97 (1st Cir. 1981) (judge's friendship with an individual tangentially related to litigation not a basis for recusal).

In *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990), the presiding judge had a friendly relationship with the Mayor of Birmingham. However, the Mayor was neither directly involved in the underlying case nor a potential witness. The Eleventh Circuit affirmed the district judge's refusal to recuse himself, stating:

> The district judge . . . did not abuse its discretion in denying the recusal motion based on his friendship and business relations with the Mayor of Birmingham. The Mayor was neither a party nor a witness in this case. Without more, the Mayor's connection with the City is insufficient to create the appearance of impropriety.

Id. at 679. *See also Baker v. City of Detroit*, 458 F.Supp. 374, 377 (E.D. Mich. 1978) ("[t]he mere fact that [the judge has a] personal friendship with Mayor [Coleman A.] Young, a nominal party to this action, cannot be said to support a reasonable inference of lack of impartiality").

Circumstances potentially more suggestive of possible conflict than the judge's relationship with John Opel have been held not to warrant recusal. *See, e.g., Little Rock School Dist. v. Arkansas State Bd. of Educ.*, 902 F.2d 1289, 1291-92 (8th Cir. 1990) (judge's friends were principles of an entity that owned land the school district had been ordered to purchase as part of a desegregation plan); *Katz*

v. Looney, 733 F.Supp. 1284, 1286-87 (W.D. Ark. 1990) (judge was a friend of a member of the defendant university's board of trustees); *Clay v. Doherty*, 608 F.Supp. 295, 300 (N.D. Ill. 1985) (judge was an "acquaintance" of an ex-defendant who was also a key witness); *M.K. Metals*, 593 F.Supp. at 966 (judge was a close friend of a family, one member of which was the co-employee of a key economic expert at trial).

Moreover, the Code of Conduct for United States Judges does not require judges to avoid normal avocational social activities.

> A judge may write, lecture, teach and speak on non-legal subjects, and engage in the arts, sports and other *social* and recreational activities, if such avocational activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties.

Canon 5, Codes of conduct for United States Judges (Apr. 5, 1973) (emphasis added).

A judge acquires friends in the same manner that friends are acquired in all walks of life, particularly when judges are active members of the community in which they live. When litigation pending before a judge involves a friend in some manner or to some degree, the judge must reach his own determination as to whether the relationship is such that he should recuse himself pursuant to § 455(a) for that reason. *See* Resolution G, Judicial Conference of the United States, *supra; Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 1125 (1990) (district judge did not reveal to parties that his son was a non-managerial employee of Hewlett-Packard). As the court observed in

Hirschkop v. Virginia State Bar Ass'n, 406 F.Supp. 721 (E.D. Va. 1975):

> The fact . . . that the Court may be personally familiar, or even friends, with potential witnesses does not make him predisposed in favor of them to the point where recusal is required. If such familiarity, or friendship, were an appropriate standard for determining when recusal is necessary, either very few cases could be heard by the federal judiciary, or "federal judges would be rendered hermits upon their appointment." More pertinently, such familiarity with witnesses does not even imply "personal bias or prejudice" against or for a party.

Id. at 725 (quoting *Firnhaber v. Sensenbrenner*, 385 F.Supp. 406, 412 (E.D. Wis. 1974)).

Applying the objective analysis test described earlier in this opinion to all the facts and circumstances in this case, including the fact that IBM was neither a party to the litigation nor had any financial interest actually or constructively known, leads one to the only decision possible – the harmless friendship of the judge with John Opel gives rise to no appearance of impropriety requiring recusal under § 455(a). Having reached this conclusion, the judge was under no obligation to advise counsel of a possible conflict and, in fact, it was undesirable that he do so. *See* Resolution G, Judicial Conference of the United States, *supra*.

(d) The Banks

The judge and/or his wife owned a small amount of stock in several banks that figured obliquely in the

evidence that was introduced in the trial of this matter. In one instance, the judge and/or his wife was a depositor in a mutual savings bank. During the course of this litigation, that bank, the Burlington Savings Bank, a mutual savings institution, converted to stock ownership and became the Bank of Vermont. The judge and/or his wife purchased a small amount of stock in the Bank of Vermont, much of which was eventually sold. None of the banks were parties to this action and had nothing to lose or gain from the litigation. Furthermore, the litigation was well along before any of the banks were mentioned or appeared in the evidence in any capacity, except for the Burlington Savings Bank which was named in the Crow-RECO complaint as a trustee and was served with trustee process at the same time RECO was served with Crow's complaint.[16]

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[16] By way of Richardson's affidavit, RECO mistakenly assumes that the Burlington Savings Bank was a defendant in the action along with RECO. ¶20. Actually, however, the Savings Bank was named as a trustee pursuant to Vt. Stat. Ann. tit. 12, § 3013 for the purpose of attaching any of RECO's assets or funds in its hands at the time of service which could eventually respond to any judgment that Crow might procure against RECO. *See* V.R.C.P. 4.1(a). *See also First Wisconsin Mortgage Trust v. Wyman's, Inc.*, 139 Vt. 350, 428 A.2d 1119 (1981), for a brief history of Vermont trustee process. The trustee process, although served at the same time as the process against RECO, was independent of the principal claim and the trustee's obligation was limited to disclosing funds or assets of the defendant in its hands and holding them until applied to the judgment or otherwise discharged. Richardson seems to have forgotten that RECO was quite aware of the purpose of trustee process when it petitioned for removal of this action from Chittenden Superior Court to this court:

(Continued on following page)

RECO contends through Richardson's affidavit, *see* ¶¶23-26, that its dealings with the banks in which the presiding judge was a stockholder required the recusal of the judge pursuant to § 455(a). According to the affidavit, the grounds for this assertion lie in Crow's pre-trial questioning of Richardson during discovery proceedings with regard to "alleged abuses by RECO and myself against the Burlington Savings Bank, the Chittenden Bank, Fidelity Union Trust Company now First Fidelity Bank – 'FFB'), the Merchant [sic] Bank and several other banking institutions in the Vermont/New Jersey area." According to Richardson, these allegations were untrue and never proven, but there was an appearance of impropriety and conflict of interest because the judge "as a stockholder of the very banks that RECO and I were accused of abusing, would not properly be able to adjudicate the case which involved such an issue." ¶23, Affidavit of May 23, 1990. In Richardson's view, the judge apparently should have known of the banks' involvement from the transcripts of Richardson's pre-trial depositions that he alleges were filed with the court, and also because, in deciding Crow's partial summary judgment motion in January 1987, the

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(Continued from previous page)

> In the complaint, no cause of action is alleged against the Burlington Savings Bank. Its only presence in the action appears to be that of a Trustee of certain funds which might be in its possession and that are due and owning to Richardson [RECO].

RECO's Memorandum of Law in Support of Petition for Removal, filed February 20, 1981.

court indicated in its opinion that it had examined the "voluminous" record in the case.[17]

Richardson's premise regarding notice to the judge is inaccurate. In accordance with Local Rule 4(E)(1), none of Richardson's pre-trial depositions taken pursuant to Fed. R. Civ. P. 30 were filed with the court.[18]

Had they been filed with the court, discovery depositions nevertheless do not become part of the record until called to the court's attention and relied upon in connection with interlocutory motions or during the course of the trial. The court has neither the time nor the inclination to otherwise read the transcripts of these depositions. They frequently contain, *inter alia*, much irrelevant material. Because extraneous matters are obviously inappropriate for a fact-finder to consider in determining the issues in a case, an unnecessary reading of transcripts of discovery depositions should be avoided for that reason, if no other.

There are other reasons why Richardson's reasoning regarding the relationship between the judge and the

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[17] The record to which the court referred, of course, was that called to its attention by the parties which was pertinent to its consideration of Crow's Motion for Partial Summary Judgment. The use of the adjective "voluminous" was perhaps a trifle expansive and "extensive" might have been more appropriate.

[18] Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, all depositions upon oral examination and interrogatories, requests for documents, requests for admission and answers and responses thereto need not be filed with the court unless required for interlocutory motions or for use at trial. Local Rule 4(E)(1).

banks is flawed. All of Richardson's and RECO's dealings with financial institutions, whether introduced through testimony or by way of exhibits, was strictly evidentiary in nature and relevant on the issue of RECO's insolvency. Whether the judge owned stock in some of the banks was immaterial and had no bearing on the admissibility of the evidence. Once admitted, the evidence was for the jury to assess and give such weight as it deserved based on the nature and extent of the proof adduced. There were no grounds for the judge, regardless of his stock holdings, to exclude it, and had he done so, it would have been plain error. Given the circumstances, stock ownership could not possibly give rise to an appearance of impropriety on the part of the court in the instant case.

RECO also relies upon *United States v. Hardy, supra,* in support of its position that the presiding judge should have recused himself. *Hardy* is simply inapposite and reliance thereon is misplaced. The issue in *Hardy,* on which there is a split of authority and which is still unresolved by the Second Circuit, is whether a judge in a criminal case who owns stock in a victim bank must recuse himself if the case involves a defendant who had defrauded that bank. Thus, the issue in that case was not, as it is in the instant case, evidentiary in nature, but simply whether the judge's financial interest was sufficient to preclude him from handling the matter, particularly the sentencing proceedings.

Once again, despite his lack of standing, Richardson asserts that, had the judge disclosed the fact of his stock ownership, "I would have immediately insisted that RECO's and my attorneys move to recuse Judge Coffrin because there was the appearance of impropriety and a

conflict." ¶25, Affidavit of May 23, 1990. As earlier indicated, Resolution G of the Judicial Conference of the United States counsels against a federal judge, in cases of possible conflict, calling upon the attorneys to express their views as to the desirability of his remaining in the case. Furthermore, although litigants ought not to have to face a judge where there is a reasonable question of impartiality, they are not entitled to judges of their own choice. H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355. *See also Hall*, 695 F.2d at 180.

Accordingly, RECO's claim that recusal of the presiding judge in this case was mandated by § 455(a) because of stock ownership in nonparty banks is completely without merit.

Conclusion

RECO's § 455(a) claim is devoid of merit. Its Rule 60(b)(6) motion fails for that reason,[19] as does its motion to recuse. Both motions must be denied, and it is SO ORDERED.

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[19] The allegations in Richardson's affidavit upon which RECO rests its claim of a violation of § 455(a) are baseless and do not rise to the level of "extraordinary circumstances" laid down by the Supreme Court as a predicate for Rule 60(b)(6) relief in *Liljeberg*. For that reason, no discussion of the three factors described in *Liljeberg*, 486 U.S. at 864, is necessary to determine whether vacating a judgment pursuant to § 455(a) is mandated in this instance.

Dated at Burlington in the District of Vermont, this 10th day of September, 1990.

/s/ Albert W. Coffrin
Albert W. Coffrin
District Judge

APPENDIX D

INDEMNIFICATION AGREEMENT

William L. Crow Construction Company (hereinafter referred to as the "Indemnitor") and International Business Machines Corporation, doing business through its Real Estate and Construction Division (hereinafter referred to as the "Indemnitee") hereby agree as follows:

1. The Indemnitor has been the general contractor for the construction of a certain Building 973, Semiconductor Manufacturing Facility for the Indemnitee at Essex Junction, Vermont.

2. The Indemnitee currently holds retainage on the said Building 973 construction project against the account of Crow.

3. This Indemnification Agreement is entered into by the Indemnitor in order to induce the Indemnitee to release said retainage to the Indemnitor.

4. (a) Without admitting any liability with respect thereto, the Indemnitor hereby agrees to indemnify and hold harmless the Indemnitee from (i) claims of mechanic's lien arising out of the construction of Building 973 and (ii) other claims asserted against both Indemnitor and Indemnitee, specifically limited to the following:

Chemtec Plastics	$ 9,879.34
Blodgett Supply, Inc.	1,097.30
Filter Equipment Co.	4,052.31
Hulbert Supply Co.	3,187.80
McEwing Fuels, Inc.	5,018.75
Newton-Metallo, Inc.	6,900.00

Presant Industrial Supply, Inc.	15,926.86
Queens City Iron and Metal Co., Inc.	$ 6,620.30
Robinsons, Inc.	1,225.93
Kessler Plumbing	64,235.90
Merriam Graves	18,106.39
Plastic Piping	9,000.00
Zurn Industries	22,903.00
Vermont Heating & Ventilating	610,000.00

(b) The duty to indemnify and hold harmless under this Indemnification Agreement shall include the duty to defend at its sole cost and expense the claims set forth above and to pay any judgment arising out of these claims. If, by reason of any of these claims, any encumbrance shall be placed upon the title of Indemnitee to its lands and premises in Essex Junction, Vermont, Indemnitor will promptly and without delay, at its sole cost and expense, take all necessary steps to remove such encumbrance by substituting alternate security or by paying the amount of the judgment or claim, or taking such other steps as may be necessary to remove the encumbrance.

5. Nothing set forth in this Indemnification Agreement shall be deemed to constitute any indemnification of the Indemnitee by the Indemnitor with respect to any claims asserted by Richardson Engineering Co., Inc. against the Indemnitee or to preclude the Indemnitor from asserting as crossclaims against the Indemnitee any claims asserted by Richardson Engineering Co., Inc. against the Indemnitor.

IN WITNESS WHEREOF, this Indemnification Agreement has been executed this 12th day of July, 1982.

INTERNATIONAL BUSINESS
MACHINES CORPORATION
Real Estate and Construction Division

by /s/ _____
(Title)

WILLIAM L. CROW CONSTRUCTION
COMPANY

by /s/ _____
(Title)

APPENDIX E

PATERSON & WALKE, P.C.
ATTORNEYS AT LAW
140 MAIN STREET, P.O. BOX 1310
MONTPELIER, VERMONT 05601-1310
TELEPHONE 802-223-1000 FACSIMILE 802-223-5271

STEPHEN C. WALKE, JR.
PHILIP H. ZALINGER, JR.
RALPH W. HOWE III

JOHN D. PATERSON
1919-1985

ROBERT H. OPEL
J. SCOTT CAMERON

JAMES M. VITT
NANCY J. CRESWELL
EMILY B. TARTTER
DONNA RUSSO-SAVAGE

February 5, 1990

Mr. Harry Richardson
Richardson Engineering
P.O. Box 989
New Brunswick NJ 08903

Dear Mr. Richardson:

As I informed you this morning by telephone, we will be unable to represent you and your firm in seeking to set aside a judgment entered against you in favor of the law firm of Langrock, Sperry, Parker & Wool.

My partner, Robert H. Opel, was a law clerk for Judge Coffrin while the action in which Langrock, Sperry, Parker & Wool represented you was before him. In addition, Mr. Opel is the son of John Opel, the former Chairman of the Board of Directors of IBM.

With kind regards,
/s/ Stephen C. Walke
Stephen C. Walke, Jr.

SCW/gem

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM L. CROW CONSTRUCTION COMPANY vs. RICHARDSON ENGINEERING COMPANY *Use short title*	Each motion must be accompanied by a supporting affidavit. 90-7913 *Docket Number* NOTICE OF MOTION *state type of motion* for Motion to Recuse

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Kevin P. Candon, Esquire
Candon and Butterfield
P.O. Box 882
Rutland, Vermont 05702
(802) 773-2110

Has consent of opposing counsel:

A. been sought? _ Yes X No

B. been obtained? _ Yes X No

Has service been effected? X Yes _ No

Is oral argument desired? _ Yes X No

(*Substantive motions only*)

Requested return date:

(*See Second Circuit Rule 27(b)*)

Has argument date of appeal been set:

A. by scheduling order? X Yes _ No

B. by firm date of argument notice? X Yes _ No

C. If Yes, enter date: January 30, 1991

Judge of agency whose order is being appealed:

OPPOSING COUNSEL: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Karen Lockwood, Esquire
Marcy M. Rehberger
Collier, Shannon & Scott
3050 K Street, N.W.
Washington, D.C. 20007

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? _ Yes _ No

(*See F.R.A.P. Rule 8*)

Would expedited appeal eliminate need for this motion? _ Yes _ No

If No, explain why not: _ Yes _ No

Will the parties agree to maintain the status quo until the motion is heard?

Brief statement of the relief requested: Defendant-Appellant requests that Judge Cardamone and any other Judge owning IBM stock, recuse themselves from sitting on this Appeal.

Complete Page 2 of This Form

By: (*Signature of attorney*)

K.P.C.

Signed name must be printed beneath

Kevin P. Candon

Appearing for: (*Name of party*)

Richardson Engineering Company

Date

1/25/91

Appellant or Petitioner:

_ Plaintiff X Defendant

Appellee or Respondent:

_ Plaintiff _ Defendant

_____ ORDER _____

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied

_____

_____

_____ _____

Date Circuit Judge

Previous requests for similar relief and disposition:

There have been no previous requests for recusal.

Statement of the issue(s) presented by this motion:

In its Appeal, Appellant seeks a new trial, based on the denial by Honorable Albert W. Coffrin,

United States District Court Judge for the District of Vermont, to recuse himself during the hearing of this matter. The request for recusal was based in part on Judge Coffrin's close association with the CEO of IBM. Appellant asserts that IBM had a substantial interest in the outcome of this case and that Judge Coffrin should have recused himself. It has come to Appellate's attention that Judge Cardamone, may be a shareholder of IBM and if so, Appellant asserts that it may not be appropriate for Judge Cardamone or any other judge holding shares of stock in IBM hear this appeal.

Brief statement of the facts (*with page references to the moving papers*):

On January 24, 1991, Appellant learned that one of the judges assigned to hear the appeal in this matter set for January 30, 1991 was to be Judge Richard Cardamone. Because Judge Cardamone sat on a prior appeal involving these parties, Defendant-Appellant had reviewed Judge Cardamone's financial disclosure report. Appellant had determined that Judge Cardamone was a stockholder of IBM and may continue to be a stockholder of IBM. Because Appellant claims that IBM has a substantial interest in the outcome of this litigation, and that Judge Coffrin should have recused himself because of his close association with John Opel, the CEO of IBM, Appellant feels that it may be inappropriate for Judge Cardamone or any other Judge holding IBM stock to hear this appeal.

Summary of the argument (*with page references to the moving papers*):

28 U.S.C. § 455 provides in pertinent part that a Judge should recuse himself in any case where

his impartiality might reasonably be questioned. Circuit Judge Lumbard, in his dissent, in *In Re: Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2nd Cir. 1988) at 1320, stated: " . . . It has been the custom of Federal Judges in the Second Circuit and elsewhere to recuse themselves whenever they or their spouses hold any stock or have any financial interest of any kind, however small, in any company or enterprise which is a party, or is linked with any party, in any matter coming before them." Appellant alleges that IBM has a substantial interest in the outcome of this case and that Judge Coffrin's association with the CEO of IBM was grounds for recusal. Appellant respectfully submits that it might be improper for any Judge holding IBM stock to sit on this case.

Harry A. Richardson, Jr., residing at 291 Meadow Road, Edison, New Jersey 08817, being duly sworn deposes and says:

1. As President of Richardson Engineering Co. (hereinafter RECO), a defendant in this action, I make this Affidavit based upon my own personal knowledge and experience.

2. On February 3, 1989, the United States Court of Appeals for the Second Circuit filed a decision in the case of *William L. Crow Construction Company* (hereinafter "Crow") *v. Richardson Engineering Company and Harry A. Richardson*, Docket No. 88-7787 (JA 572a-574a)

3. Crow was IBM's Construction Manager for a Semi-Computer Manufacturing Facility constructed by IBM in Burlington, Vermont on which RECO performed the Mechanical Work.

4. IBM has a substantial interest in the outcome of the *William L. Crow Construction Company v. Richardson Engineering Company* litigation. The evidence supporting the fact that IBM has a substantial interest in the outcome of that litigation is set forth in my Affidavits dated May 23, 1990, (JA 44a-64a) and July 27, 1990 (JA 489a-501a)

5. It was necessary for RECO to raise a very sensitive issue in this case on or about May 25, 1990, when RECO filed its Motion for Relief of Judgment Order and Motion to Recuse. (Docket No. 90-7913)

6. The aforesaid motion(s) were based in large part upon the fact that IBM has a substantial interest in the outcome of the case which was known to the Court. It is further based upon a relationship which the District Court Judge has with the family of the Chief Executive Officer of IBM, which was never disclosed to RECO and was not known to RECO until on or about February 8, 1990. The Brief for Defendant-Appellant and the Reply Brief of Defendant-Appellant, filed in this matter further documents the substantial interest that IBM has in the outcome of this case and the relationship of the Judge to the CEO of IBM.

7. RECO's Motions for Relief of Judgment Order and Motion for the Trial Judge to Recuse himself from hearing the Motion for Relief from Judgment were both denied on September 10, 1990 by District Court Judge Coffrin. RECO filed a Notice of Appeal on October 5, 1990.

8. After the decision of the United States Court of Appeals for the Second Circuit was handed down on February 3, 1989, I obtained a copy of the Financial

Disclosure forms of Judge Cardamone dated May 15, 1988 and April 8, 1989 (JA 473a-480a). This is set forth in paragraph 48 of my Affidavit of May 23, 1990 (JA 61a). Subsequently I obtained a copy of the Financial Disclosure Form of Judge Cardamone dated May 2, 1990. (Exhibit A)

9. At noon today, I learned that Judge Cardamone was one of the panel of three judges designated to hear RECO's Appeal from Judge Coffrin's Opinion and Order of 9/10/90, which is scheduled for 1/30/91.

10. Since all three Financial Disclosure Forms of Judge Cardamone set forth that he and his spouse are stockholders of IBM, with a stock value involved of between $20,000.00 and $65,000.00, it occurred to me that RECO was obligated to bring this matter to the attention of Judge Cardamone, so that he would have the opportunity to recuse himself. I think he would want to have this information at the earliest possible date before the Oral Argument which is scheduled for Wednesday, January 30, 1991.

11. One of the major issues raised in RECO's appeal is whether or not IBM has a substantial interest in the outcome of Crow v. RECO and whether the financial

interest of IBM in the outcome of the case was known to the District Court Judge.

Dated at Edison, N.J. this 24th of January, 1991

/s/ Harry A. Pierceson Jr.

24th Day of Jan. 1991
Middlesex County
/s/ Charles Lee
NOTARY PUBLIC OF
NEW JERSEY
My Commission Expires
July 24, 1994

APPENDIX G

[p. 1] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM L. CROW CONSTRUCTION COMPANY,

Appellee,

Docket No. 90-7913

against

RICHARDSON ENGINEERING COMPANY,

Appellant.

Transcript taken from a tape recording of the hearing of appeal on January 30, 1991.

BEFORE:

JUDGE THOMAS J. MESKILL,
JUDGE WILLIAM H. TIMBERS,
JUDGE RICHARD J. CARDOMONE,
Presiding.

[p. 2] APPEARANCES:

KAREN M. LOCKWOOD, ESQ.,
Attorney for Appellee William L. Crow Construction Company.

KEVIN P. CANDON, ESQ.,
Attorney for Appellant Richardson Engineering Company.

* * *

[p. 3] JUDGE MESKILL: Mr. Candon, for your information, the disqualification motion has been denied.

MR. CANDON: Your Honors, my name is Kevin Candon, and I represent Richardson Engineering. With me seated at the table is Mr. Harry Richardson, who is president of the company. Richardson is here seeking a new trial because of Judge Coffrin's close associations with certain individuals, including John Opel who at all times material hereto was the chief executive officer of IBM.

This case – Richardson was a subcontractor and Crow was the managing contractor and general contractor of a substantial multi-million – $50 million construction project in Essex Junction, Vermont that IBM constructed.

The rule of law governing this case is covered in 28 U.S.C. Section 455 A, which concerns recusal of judges. That provides that a judge should recuse himself in any case where his impartiality would [p. 4] reasonably be questioned. The standard here is an objective rather than a subjective standard.

JUDGE MESKILL: IBM is not a party in this action.

MR. CANDON: Yes, but they do have a substantial interest in the outcome of this case, your Honor.

JUDGE MESKILL: What is their interest? Your client was fired from the job, wasn't he?

MR. CANDON: Yes, your Honor, and this suit concerns a suit by Crow against Richardson and counterclaims by Richardson because Richardson claimed they were improperly thrown off the job.

JUDGE TIMBERS: The only connection of IBM as I understand the papers is the building up in Vermont

was to be occupied by IBM, but they are not a party to this appeal, in no way, shape or form, nor were they in the District Court.

MR. CANDON: Well, your Honor, under the general construction contract, [p. 5] under Article 4.3 which covered acceleration charges, this is the contract between IBM and Crow which was in evidence and was a substantial part of the case, Article 4.3 concerned accelerated charges.

JUDGE TIMBERS: But this lawsuit isn't over accelerated charges.

MR. CANDON: Oh, yes, it is.

JUDGE TIMBERS: I thought this lawsuit was over whether they were improperly fired.

MR. CANDON: Yes, but there was also a counterclaim by Richardson for accelerated charges, your Honor, and under Article 4.3 of the contract, IBM has to pay. If Richardson prevailed on its counterclaim for accelerated charges, then IBM has to pay him. And the reason that –

JUDGE MESKILL: What's happened to that lawsuit? Has that been decided?

MR. CANDON: No, your Honor, that's pending in Westchester County in New York. That's a different matter.

JUDGE MESKILL: That's a [p. 6] different matter? Well, then, how is it involved in this lawsuit?

JUDGE CARDOMONE: That's a separate case, isn't it? It's a separate case.

MR. CANDON: Yes, it is a separate case.

JUDGE CARDOMONE: You call it a counterclaim.

MR. CANDON: In this action, your Honor, there was a claim for the accelerated charges. The reason that Richardson fell behind and ran into financial problem was that IBM made substantial changes in the construction contract in the building. Under the contract, they did not give them extended time to finish the project. Richardson had to hire – they had to fast-track it, which was much more expensive. They were not paid for the accelerated charges. They were thrown off the job after completing 93 percent because of financial problems.

Richardson claims – the claim [p. 7] was for accelerated charges and, in fact, your Honor, the jury in their decision found that Richardson was entitled to accelerated charges for any changes made, any oral changes made in the contract. Judge Coffrin had ruled, however, that Richardson's expert could not testify as to damages so the injury had no measure of damages. They did find Crow to be liable, but they did not find damages because the testimony had then (inaudible).

JUDGE MESKILL: What happened to the so-called counterclaim?

MR. CANDON: Your Honor, that was decided by Judge Coffrin. There were four counts to the counterclaim, it was decided by Judge Coffrin in summary judgment against Richardson.

JUDGE MESKILL: It is not a subject to this appeal.

MR. CANDON: Well, yes, it is, your Honor. We are asking for a new trial because we specifically –

JUDGE TIMBERS: Because of his [p. 8] rulings on the counterclaim?

MR. CANDON: I'm sorry?

JUDGE TIMBERS: Because of his summary judgment rulings on the counterclaim?

MR. CANDON: Yes, we specifically mentioned that.

JUDGE TIMBERS: Now, what's happening up in Westchester County, you've got me all excited in this case now.

MR. CANDON: That action is still pending. I am not involved in that. I'm sorry.

Your Honor, in addition to Article 4.3 of the contract, IBM also had an interest pursuant to Article 7.4 of the contract. It was a guaranteed maximum cost provision. And what that says is – there was a contract of, I believe, $24 million. If the cost came in under $24 million, then IBM and Crow would split the amount of that cost. In the IBM versus Richardson case in Westchester County, IBM has made a claim for $600,000 under that Article 7.4.

[p. 9] Your Honor, Crow was the construction manager for IBM, and their interests are very similar. The same attorneys in Vermont that handled Crow's litigation handled IBM's litigation.

JUDGE MESKILL: Was this trial conducted before a magistrate?

MR. CANDON: Which trial, sir?

JUDGE TIMBERS: Judge Coffrin was the district judge.

JUDGE MESKILL: Wasn't this in the hands of a magistrate during a long period of time?

MR. CANDON: For discovery only, and it was returned to Judge Coffrin for trial.

In this case, your Honor, the case started out, it was tried for three days, Judge Coffrin declared a mistrial, in part, your Honor, because IBM employees and stockholders had been seated on the jury. And Judge Coffrin declared a mistrial and in the second trial ruled that because of IBM's – and I think he described it in his own [p. 10] words as "prominent interest in the case" – that no IBM employees or stockholders would be seated on the case.

JUDGE MESKILL: But Judge Coffrin doesn't own any IBM stock or he hadn't at the time of this action?

MR. CANDON: No, your Honor.

JUDGE MESKILL: And the law clerk didn't work on the case?

MR. CANDON: Well, your Honor –

JUDGE MESKILL: When the law clerk was with him, the case was with the magistrate, wasn't it?

MR. CANDON: Well, yes, and getting to that point, the judge said that he had no dealings with the

case between – during the time that – well, between '82 and '86 when the case was in the hands of the magistrate.

However, the record indicates that the judge did make a decision and issued a 13-page decision on Crow's request for a jury trial in 1985. So, the judge is [p. 11] in error. He's looking back in 1982. We don't know whether Robert Opel worked on the case or not. There was never any disclosure, which is another issue. There was no disclosure by Judge Coffrin here.

JUDGE MESKILL: What was your position on the jury trial issue? Did you prevail?

CANDON: There was a jury trial granted, your Honor.

JUDGE MESKILL: Did you prevail in this decision, on the 13-page opinion written on the jury trial? You're claiming he was involved during this period of time when he had this law clerk. Did your client prevail on this particular issue in the interim?

MR. CANDON: No, your Honor.

JUDGE MESKILL: He lost? He was against the jury trial or for it?

MR. CANDON: I believe so. No, I'm sorry, we did prevail. Your Honor, I did not try this case.

JUDGE MESKILL: It went your [p. 12] way?

MR. CANDON: Yes.

JUDGE MESKILL: So you have nothing to complain about. The other side should be complaining.

MR. CANDON: I'm not complaining about that, your Honor. I'm only saying that Judge Coffrin, when he stated he had nothing to do with that case during that time –

JUDGE MESKILL: Okay. Well, if it was an error, it was a harmless error, wasn't it? It was a harmful error, at most.

MR. CANDON: Well, your Honor, the case law in the case, a law clerk is very important to a judge's thinking and discussing of the case.

JUDGE TIMBERS: I don't think you have to lecture this court on the relationship of the law clerk to the judge. They are many cases not only in this court but in other courts that hold squarely that a law clerk can participate in the [p. 13] proceedings even though he has relatives that are related to the judge. You've got a case on very thin ice here claiming there is conflict between the judge's law clerk and the judge.

MR. CANDON: Well, your Honor –

JUDGE TIMBERS: In fact, you didn't prevail before Judge Coffrin. He wasn't born yesterday. He's been around a good deal.

MR. CANDON: Yes, sir.

JUDGE TIMBERS: And you've been up in this court before on this case, have you not?

MR. CANDON: Yes.

JUDGE TIMBERS: This is your second trip up here.

MR. CANDON: Yes. Not me personally, but my client, yes.

Your Honor, John Opel was the C.E.O. of IBM. Between the time of the mistrial and the time of the opening of the second trial that went to completion, Judge [p. 14] Coffrin visited in Florida with John Opel. It was right before the second trial. Judge Coffrin has admitted or indicated that he had a pleasant family oriented social relationship.

JUDGE MESKILL: Well, he was the father of one of his law clerks. I mean, what's wrong with that? You are not suggesting that he went to visit with him to talk about the case, are you?

MR. CANDON: No, your Honor, but I would refer the court to the case of United States versus Murphy. In that case, a case out in Chicago, the prosecuting attorney and the judge, immediately following the criminal trial, went on vacation together, and the court found there that that would create an appearance of impropriety.

JUDGE MESKILL: But he didn't go on vacation with these people. He met them.

MR. CANDON: Well, he vacationed with them in Florida, your [p. 15] Honor. That shows that he –

JUDGE TIMBERS: They were social friends and had been for a long time, had they not? And the law is crystal clear that social relationships are not the equivalent of – do not constitute ground for recusal.

MR. CANDON: They do, your Honor, it depends on the closeness of the case, the closeness of the

relationship. If you are close enough to someone, and I think a reasonable person looking at the facts, if they saw the presiding judge and the C.E.O. of a company with an interest totaling millions of dollars going on vacation right before the trial of a case, I think to a reasonable person that is improper.

JUDGE TIMBERS: What you are saying, of course, is all predicated on a proposition that I don't subscribe to, namely that IBM had an interest in this case. It absolutely did not. It is crystal clear. It is right before us. They were not a party to this appeal, they were not a [p. 16] party to the case in the District Court. You have tried to bring them in, but so far unsuccessfully.

MR. CANDON: Well, your Honor, I don't know if the Court is familiar with the case of Lila Berg versus Health Services Acquisition. In that case the judge was a – well, I don't know if I am over my time here. I believe I reserved some time.

JUDGE TIMBERS: If the devil can quote scripture, you might be interested in reading an opinion, but don't come back and try to argue.

Just out of academic interest, you might want to look at the opinion in re Allied Signal, Inc., 891 F 2nd 967, First Circuit Court 1989 written by the present chief judge of that court, and there you'll see quite an egregious relationship between law clerks to a judge presiding at a trial that had gone on for two years. And it turned out those law clerks were related to parties on both sides of the case. Not just witnesses. And in a very fine opinion, [p. 17] which is probably one of the leading cases on that type of conflict of interest today, he found no conflict

whatsoever requiring mandamus. The only difference between that case and some of the ones you cited is that it came up on mandamus and probably should have been denied on that ground alone.

Thank you very much.

JUDGE MESKILL: You'll still have your three minutes, Mr. Candon.

MR. CANDON: Thank you.

MS. LOCKWOOD: If it please the Court, my name is Karen Lockwood, and I represent Crow Construction Company in this matter on appeal from Judge Coffrin's post-appeal decision not to recuse himself.

Mr. Richardson, Harry Richardson has lost at each step in this system and he now tries to impugn the system. Mr. Candon's opening statement that he is seeking a new trial is absolutely right. He is seeking a new trial despite the fact that we spent 26 trial days in Vermont in a case that had been filed eight years before with [p. 18] careful discovery, absolutely attentive motion practice, assignment to a magistrate during the early parts of the case, the judge's complete understanding and involvement in the legal issues as well as the ebb and flow of the day-to-day trial.

We have been here before the Second Circuit. The Second Circuit summarily affirmed, en banc, suggestion was made an no judge voted in favor – requested that a vote be taken, I'm sorry, and the Supreme Court denied cert. on the first Monday of October.

JUDGE CARDOMONE: This lawsuit that we are concerned with, Ms. Lockwood, is between Crow and Richardson; is that correct?

MS. LOCKWOOD: Yes.

JUDGE CARDOMONE: And there is a lawsuit between Richardson and IBM in Westchester County; is that right?

MS. LOCKWOOD: Yes.

JUDGE CARDOMONE: It is a separate lawsuit, it isn't any part of this [p. 19] lawsuit?

MS. LOCKWOOD: It is an entirely separate lawsuit, entirely separate counsel. It is not the case that Crow's counsel represented Crow and IBM. What is the case –

JUDGE MESKILL: Is there anything in this case that would be res judicata or collateral estoppel, in effect, in Westchester County?

MS. LOCKWOOD: IBM is not a party to the case in Vermont that is on appeal here. I don't see, therefore, depending on which way it was working, I think the question you mean to ask is no, it would not be.

Furthermore, Mr. Candon has spent some time trying to extract some remote speculative interest out of the contract. In fact what he is unable to show, and what this Court I think has indicated it sees already, is that the so-called shared savings clause, the so-called acceleration charges clause, those [p. 20] are two clauses of many in a 26- to 30-page set of general conditions which applied on

the job and neither one of them take on the gloss that Mr. Candon would like to give them here.

Indeed, I would take first Article 4.3. What that article says is that if an acceleration occurs, an acceleration is elsewhere defined in the general conditions under very careful circumstances to require advance approval of the owner of spending any acceleration cost before acceleration is delivered and further making clear that the only charge for any acceleration if approved would be the premium time portion only of the wage of overtime that is paid. That is all elsewhere.

The only clause Mr. Candon would refer you to here is one which says there may be a reimbursement as a job management matter for any – for the overhead costs alone, a further fraction, unless Crow is at fault.

[p. 21] I submit, no one was determining in this case what IBM's responsibility may have been under any clause. Because IBM was not a party. IBM's responsibility was not an issue here and is not an issue here.

Judge Coffrin was uniquely able to test these waters. He had been through an eight year piece of litigation. He did test the waters in a careful 30-page opinion and he concluded properly as a matter of fact that IBM had no financial interest. Now I think Richardson, I would submit, makes a fundamental misapprehension of law in its brief or perhaps Mr. Richardson's affidavit.

In the reply brief, page 2, they would submit that the patina that they've tried to paint would lead a reasonable person to believe that IBM had an interest. That is not a matter for interpretation. That is a fact. It is a fact and

Judge Coffrin properly found as a fact that IBM was not a party and had absolutely no financial interest in the outcome of the [p.22] litigation.

What Judge Coffrin was to do, and this Court would review under an abuse of discretion standard, is only to review the facts, the facts as found, to determine whether, given those facts, an impartial objective reasonable person would believe that the judge was not impartial. Judge Coffrin spent time and careful consideration and careful review of case law all over the country to address Mr. Richardson's contentions, and he found as to the allegations on John Opel, that is a social acquaintance.

Unless the Court has questions, I don't plan to go into that again. I would say, however, that the Murphy decision is entirely distinguishable. That was not a father to the clerk who happens to be unrelated to the litigation, that was where the prosecutor and the judge were together in court day after day before taking a vacation, and they had a very old, very close relationship.

[p. 23] JUDGE TIMBERS: That was the Seventh Circuit Court, I understand. We are now in the Second Circuit Court here.

MS. LOCKWOOD: This is the Second Circuit Court, and even the Seventh Circuit Court admonished those who would read that opinion that it was closely limited to those facts and every case has to be taken on its own facts. Our case and our facts shows there is no partiality by virtue of this social acquaintance. There is no partiality by virtue of the law clerk. We have cited as well as the Allied Signal case, the trial court opinion in re San Juan DuPont Plaza Hotel fire litigation.

JUDGE TIMBERS: You are familiar with that case?

MS. LOCKWOOD: Yes, we are.

JUDGE TIMBERS: I am glad you are.

MS. LOCKWOOD: And with respect to the banks, I almost hesitate to bring it up because it is not brought up in the reply brief and I assume it is dropped, it should [p. 24] be dropped, what we see in this litigation is that the only person who thinks things went wrong in Vermont is Harry Richardson. But he as the litigant has been dispointed and even a disgruntled litigant is not the standard for a reasonable man either for Judge Coffrin's review or this Court's review. He is the one that believes I wanted to take his deposition in Washington, D.C. so that I could wire him to a computer. He is the one who told the jury it was okay to be kiting checks because he was only trying to save his creditors. He's the one whose affidavit in this recusal matter attempts to reargue the merits of the underlying dispute. We have already said that's been affirmed, it is not the issue. What he is not is objective, not impartial and not reasonable.

Judge Coffrin, fully attentive to all the details of the case, and knowledgeable about all the contractual issues, steeped in the ebbs and flows of the case, paid careful attention to the existing [p. 25] case law, found the case law uniformly supported the conclusion that he did the only right thing, and this Court under its proper standard of review of abusive discretion needs only to look as far as Judge Coffrin's careful 30-page opinion in order to confirm.

If the Court has not further questions, I would end my argument there. Thank you.

MR. CANDON: Your Honor, I would point out to the Court the case of Lila Berg versus Health Services Acquisition, Inc., which is a Supreme Court case, and on that case the presiding judge was on the board of directors of Loyola University and at the same time he was deciding a contract concerning a certificate of need between an individual and another entity as to who owned the certificate of need. Lila Berg had a contract with the university to put the hospital there if – and had a contract to sell the land to Lila Berg if he prevailed on the case with the [p. 26] other entity that the judge was deciding. So if the judge decided that Lila Berg got the certificate of need, Loyola would sell the land for millions of dollars.

JUDGE MESKILL: It would benefit Loyola and he sat on the board.

MR. CANDON: Right. In that case Loyola is not a party but they had a substantial interest in the outcome of the case. In this case IBM is not a named party, but they have a substantial interest in the outcome of the case.

And it is our –

JUDGE MESKILL: What was their substantial interest?

MR. CANDON: Well, your Honor, during the first trial –

JUDGE MESKILL: They are going to get a building no matter how this case turned out, and they

had a fixed price contract for the construction of the building, didn't they?

MR. CANDON: There were changes, acceleration charges, there were [p. 27] millions of dollars at stake here. Your Honor, Mr. Rosenberg, who represented Richardson on June 9th indicated to Judge Coffrin, "Your Honor, we have a subcontract with Crow, the prime contract is with IBM. The contracts will be in evidence. Any costs that are approved changes that are to be compensated by Crow to Richardson ultimately are charges that are attributable to IBM unless some sort of a hold harmless or release has been negotiated. This we are not privy to. Under a normal construction contract, the owner pays valid costs incurred by the subcontractor at the request of the owner and/or the general contractor." Right here, Mr. Rosenberg told Judge Coffrin.

JUDGE TIMBERS: That doesn't make IBM – of course it's not a party to the case. It wasn't below and isn't here, and it doesn't create an interest which is what Judge Meskill was asking you about.

JUDGE MESKILL: If Judge Coffrin were a shareholder in IBM, you might [p. 28] have an argument that there could be an inference. But he wasn't a shareholder in IBM, was he?

MR. CANDON: If you accept that IBM had an interest –

JUDGE MESKILL: No, no, no, I'm saying –

MR. CANDON: For the purposes of argument, your Honor, then we feel that his association with John

Opel and the fact that he went for vacation with him just prior to the trial –

JUDGE TIMBERS: That's a really circuitous reasoning for which there's no substantiation, I'm satisfied.

JUDGE MESKILL: You know, there's a primary obligation on the part of the judge to sit on matters that come before him. It's equally as strong as the rule about disqualification. And judges are not supposed to go out of their way to look for attenuated circumstances under which they can either on their own motion or motion of a party recuse themselves. Otherwise, no [p. 29] judge would be able to sit on any case.

MR. CANDON: But to go on vacation immediately before trial with a C.E.O. –

JUDGE TIMBERS: You said that over and over again, and the more you say it the less convinced I am it has any bearing whatsoever in this case. I think you really should check –

JUDGE CARDOMONE: Would you explain to me that counterclaim argument you made earlier? Because I'm still a little bit not understanding. I understand that Richardson and Crow are the parties before us in this case, and that Richardson and IBM is a separate case pending in Westchester County, which is not part of this case. But in response to a question that Judge Timbers or Judge Meskill asked, you said there was some kind of a counterclaim in this case involving IBM.

MR. CANDON: There were four counterclaims, your Honor.

JUDGE CARDOMONE: One that IBM [p. 30] asserted as a party?

MR. CANDON: No, no, I didn't mean to say that.

JUDGE CARDOMONE: I gather when you said they were related, they were in this case. They are not a party to this case, there is no question about that?

MR. CANDON: No, no, I'm sorry. IBM has never been a party to this case, your Honor.

JUDGE CARDOMONE: So we aren't dealing with the IBM as a party. We are only dealing with your argument as to their interests under a fixed price contract for a building they wanted to have built.

MR. CANDON: That's correct, your Honor.

JUDGE MESKILL: Okay. We will reserve our judgment.

* * *

[p. 31] CERTIFICATE

STATE OF NEW YORK)
:ss
COUNTY OF NEW YORK)

I, ELIZABETH K. ROBERTSON, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That I transcribed the tape of the proceedings in the within entitled matter, and that the within transcript is a true record of said tape recording.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of February, 1991.

/s/ Elizabeth K. Robertson
ELIZABETH K. ROBERTSON

APPENDIX H

28 USCS § 455 ORGANIZATION OF COURTS

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is

not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(June 25, 1948, ch 646, § 1, 62 Stat. 908; Dec. 5, 1974, P. L. 93-512, § 1, 2d Stat. 1609; Nov. 6, 1978, P. L. 95-598, Title II, § 214(a), (b), 92 Stat. 261.)

Supreme Court, U.S.
FILED
JUL 31 1991
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(2)

No. 91-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARDSON ENGINEERING COMPANY,
Petitioner,

v.

WILLIAM L. CROW CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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July 31, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the courts below properly recognized that a belated post-appeal recusal motion was unwarranted under circumstances in which the court's impartiality would not reasonably be questioned.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court of Appeals were Richardson Engineering Company, appellant, and William L. Crow Construction Company, appellee.

The parties before the District Court were William L. Crow Construction Company, plaintiff and counterclaim-defendant; Richardson Engineering Company, defendant and counterclaim-plaintiff; and Harry A. Richardson, Jr., defendant.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent William L. Crow Construction Co. ("Crow")[1] respectfully opposes the petition for a writ of certiorari filed by Richardson Engineering Company ("Richardson"). This is the second attempt by Richardson to secure this Court's review on this ten-year-old case. After losing its first attempt on the merits two years ago, Richardson returned to the trial court with a recusal motion that failed. Now it would have this Court grant review based upon Richardson's personal conjecture and novel theory of recusal, which both the trial judge and the entire Court of Appeals rejected.

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[1] Pursuant to Supreme Court Rule 29.1, Respondent states that William L. Crow Construction Company is a wholly owned subsidiary of J. A. Jones Construction Company, and its immediate parents, Jones Group, Inc. and Philipp Holzmann U.S.A., Inc., none of which is publicly traded. Their parent company is Philipp Holzmann A.G.

OPINIONS BELOW

The 36-page Opinion and Order of the District Court for the District of Vermont denying Richardson's post-trial and post-appeal motion for recusal is unreported, and is reprinted as Appendix C to Petitioner's brief. App. 6a-36a.

The unanimous summary affirmance of the United States Court of Appeals for the Second Circuit, filed on February 1, 1991, which is unreported, is reprinted as Appendix B. App. 3a-5a. The Court of Appeals' denial of Richardson's petition for rehearing and declination of the *en banc* suggestion, filed on April 2, 1991, is reprinted as Appendix A. App. 1a-2a.

STATEMENT

The First Petition

The first petition, filed on June 26, 1989, sought review of the merits of a dispute between Richardson, a subcontractor, and Crow, the general contractor on an express written subcontract for the construction of a semiconductor manufacturing plant in Burlington, Vermont.[2] On January 5, 1981, before Richardson's work was completed, Crow was forced to terminate Richardson for breaches of contract related to Richardson's multiple defaults on the subcontract, insolvency, inability to perform, and disastrous financial condition.

This lawsuit between Crow and Richardson Engineering followed. After six weeks of trial to a jury in March, 1988, the District Court entered judgment in favor of Crow. The Court of Appeals affirmed on February 3, 1989. It denied a petition for rehearing, with no judge

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[2] The owner of the plant was International Business Machines Corporation ("IBM"). IBM was at no time a party to this lawsuit, nor did it have an interest in the outcome. In fact, Richardson sued IBM directly in Westchester County, New York, on its claims arising out of this building project. *See* App. 66a-67a.

asking that a vote be taken on Richardson's *en banc* suggestion.

Richardson thereupon filed its first petition for certiorari in this matter, hoping to obtain a new trial. *Richardson Engineering Co. v. Crow Construction Co.*, No. 88-2093 (U.S. July 26, 1989). This Court denied that petition on the first Monday in October, 1989.

The Instant Petition

Eight months after this Court's decision denying the first petition, Harry A. Richardson, Jr. himself endeavored to seek a new trial for Richardson by charging on May 29, 1990 that the trial judge should have been recused in the first place.[3] As grounds, relying upon 28 U.S.C. § 455(a), Richardson posited that a former law clerk, who did not work on the case, was the son of an IBM executive; that the judge had become casually acquainted with the clerk's father; and that the judge had accounts in certain non-party banks whose names were mentioned at trial.[4]

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[3] Harry Richardson had been president and majority shareholder of Richardson Engineering Company. However, because the Company is in bankruptcy under Chapter 7, only the trustee has standing to pursue this matter. 11 U.S.C. § 541 (1989). Judge Coffrin only assumed, without deciding, that Harry Richardson had standing. App. 11a, n.5.

[4] The trial judge, Albert O. Coffrin, Chief Judge, carefully considered and denied Richardson's motion in a lengthy written opinion. App. C. He observed that IBM was not a party to the case and had no interest in the outcome. App. 22a. As to the law clerk argument, he found that the clerk did not participate in the case. The lawsuit had been assigned to a magistrate during the entire time the clerk worked for Judge Coffrin. App. 24a-26a. As to the casual acquaintance with the clerk's father, the court found that the acquaintance was merely social and was limited in nature. App. 27a-30a. As to the banks, the court found that they likewise were not parties and had nothing to gain or lose from the litigation. Thus, whether the trial judge owned stock in any of the banks was immaterial and had no bearing on the purely evidentiary role that the bank names played in the litigation. App. 30a-35a.

This second time around, the Court of Appeals held that none of the alleged bases for recusal presented the appearance of partiality that 28 U.S.C. § 455 is designed to avoid. App. 4a.[5] Richardson's petition for rehearing also was denied. No judge in the Circuit requested that a vote be taken on the *en banc* suggestion relating to the same issues addressed to this Court. App. 1a-2a.

REASONS THE PETITION SHOULD BE DENIED

Richardson seeks to elevate personal surmise and conjecture as to matters unique to Richardson's case to a level worthy of review by this Court. The holdings of the lower courts in this case, however, are entirely consistent with the uniform and well-founded case law regarding recusal. This case presents no issue to warrant invocation of this Court's certiorari jurisdiction.

The standard for recusal under section 455 is well-settled by this Court and among the circuits. The test for an appearance of partiality under section 455 is not the opinion of the disappointed or disgruntled litigant, but whether a reasonable person viewing the facts objectively would doubt the judge's impartiality. *E.g.*, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). Richardson would replace its private dissatisfaction based upon imagined circumstances for the objective, reasonable-observer test based upon undisputed facts.

The law clerk does not present a disqualifying circumstance, and Richardson does not seriously argue to the contrary here. IBM was not a party, and had no interest in the outcome. Further, disqualification of a judge is not required even when a law clerk who has a conflict of interest does not work on the case, as this clerk coin-

[5] As to Richardson's assertion that appellate panelists, too, should be recused, its motion for disqualification was denied. App. 49a.

cidentally did not. *E.g., In re Allied Signal, Inc.*, 891 F.2d 967 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2561 (1990); *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486, 490 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986).

Similarly, the acquaintance with the clerk's father does not present a disqualifying circumstance. It is uniformly held in a wide variety of circumstances going beyond those presented here that a judge's casual acquaintance or personal friendship, even with a party, does not create the appearance of partiality. *E.g., McWhorter v. Birmingham*, 906 F.2d 674, 679 (11th Cir. 1990) (friendship with Mayor of Birmingham); *In re Beard*, 811 F.2d 818, 828 (4th Cir. 1987) (friendship with president of company whose bankruptcy case was pending); *In re United States*, 666 F.2d 690, 696-97 (1st Cir. 1981) (friendship with individual tangentially related to litigation).

Nor does Richardson's effort to imbue IBM with some remote or contingent interest in this case aid its argument.[6] Remote, contingent or speculative interests are

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[6] Richardson's laundry list of assertions by which it seeks to tie IBM to this case amounts to no more than prior misplaced assertions, erroneous interpretations of fragments of contract provisions, and plain misperception.

For example, as Judge Coffrin found, the cost-saving provision in the prime contract between Crow and IBM does not give IBM an interest in the outcome. The contract in operation here, between Crow and Richardson, was for a fixed price. App. 22a-24a. Also, a brief glance at the extra-record document that Richardson cites as an indemnification agreement demonstrates that, far from making IBM "liable," as Richardson asserts, it reaffirms that there is *no* agreement between IBM and Crow as to Richardson's claims. App. 38a, ¶5.

Richardson's reference to IBM's attendance at a settlement meeting only underscores that Richardson's claims against IBM were the subject of a separate lawsuit elsewhere. And Judge Coffrin made clear that Richardson's attempt to prop up its argument by referring to the first trial ending in a mistrial is both inaccurate and inapposite. App. 8a & n.3.

not the kind of interests that reasonably bring into question a judge's impartiality under section 455. *In re Drexel Burnham*, 861 F.2d at 1313-14; *see also In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir. 1986) (judge's ownership of stock in bank was not grounds for recusal because judge's interest in outcome of case was speculative and remote); *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55, 63 (C.D. Cal. 1975) (judge's ownership of stock in oil company did not require recusal in proceedings involving subsidiary of a company that had done business with his company).

Richardson's argument that the courts below departed from *Liljeberg* is wrong. The courts applied the objective, reasonable-observer test reiterated in that decision. Whereas the judge in that case was a governing officer of the entity that would directly and immediately profit as a result of the judge's decision, the judge in this case has no connection whatsoever to the only two parties that had an interest in this litigation—Crow and Richardson.

Richardson cites only one case in an effort to display some split between the circuits; but reliance on that case is unavailing. In *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), the court discussed a potential appearance of partiality resulting from the fact that the trial judge was the best of friends with the prosecuting attorney in a political corruption trial of another judge arising from the Operation Greylord investigations in Chicago.[7] Even there, the court narrowly limited its discussion to the particular facts of that sensitive case. *Id.* at 1538. Moreover, the passage of time between the trial

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[7] In this case, IBM was not even a party. And, as demonstrated in the trial court's opinion, the acquaintance was purely social, contacts were infrequent, and business affairs were not a topic of conversation. App. 27a. The executive had no role in the lawsuit; he never appeared as a witness; nor was his name mentioned.

and the recusal motion as a matter of law made the recusal application untimely.[8]

This case similarly presents no policy issues worthy of this Court's certiorari jurisdiction. The review by all judges below yields a result squarely within the provisions of section 455 and the policy underlying it. Richardson apparently desires to create a new principle that recusal is required whenever a disgruntled litigant imagines attenuated connections between trial actors and non-parties. Such attenuated circumstances cannot justify recusal, however. That result would contravene the efficient administration of justice, and would fly in the face of the well-settled principle that our independent and strong judiciary, in applying section 455, should remain aware of the injustices that arise out of unwarranted disqualifications. *In re Allied-Signal*, 891 F.2d at 970. The courts below did the only proper thing; they declined to recuse because there are not grounds under section 455 to have done so.

CONCLUSION

For the reasons discussed herein, Crow respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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July 31, 1991

[8] Richardson's motion in this case was untimely as a matter of law, and this untimeliness provides independent grounds for rejection of its Petition. There is nothing here that suggests the need for recusal, let alone the extraordinary circumstances necessary to reopen lengthy and complex litigation three years after judgment was entered. *See Liljeberg*, 486 U.S. at 864; *In re Allied-Signal*, 891 F.2d at 973.

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No. 91-7

In The

Supreme Court of the United States

October Term, 1991

RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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APPELLANT'S REPLY BRIEF

Appellant Richardson Engineering Company ("RECO") respectfully calls this Court's attention to the fact that a number of issues first raised in Respondent William L. Crow Construction Company's ("Crow") Brief in Opposition underscore the reasons that Appellant's case is worthy of review by this Court.

STATEMENT

The First Petition

The First Petition filed on June 26, 1989, sought review of the merits of the dispute between RECO and Crow. Following a trial, RECO filed a Petition for Certiorari hoping to obtain a new trial. *Richardson Engineering Company vs. Crow Construction Company,* No. 88-2093 (U.S. July 16, 1989). The petition was denied.

RECO did seek a review of Judge Coffrin's rulings by the Second Circuit and by this Court well before it learned of the appearance of conflict of interest on the part of Judge Coffrin. The First Petition dealt with two primary issues. One was Judge Coffrin's refusal to allow RECO's expert witness to testify as to the value of acceleration damages due from Crow to RECO. The jury had found that RECO was entitled to said damages but by not allowing the expert to testify, RECO was not permitted to prove the value of its damages. The second issue was Judge Coffrin's award of $1,247,000 of attorney's fees to Crow against RECO which dwarfed the judgment of $546,375.00 for Crow's completion costs.

On appeal, the Second Circuit found that they would not overturn Judge Coffrin's rulings because they were within his "sound discretion". However, neither this Court nor the Second Circuit, nor this Appellant knew at the time that Judge Coffrin made his decisions, that his "sound discretion" was compromised and colored by his undisclosed relationship with John Opel, the Chief Executive Officer of IBM.

The Instant Petition

The second petition, filed the 28th of June, 1991, sought review of denial of Appellant's Rule 60(b)6 Motion for Relief of Judgment Order. Appellant had moved for a new trial relying upon 28 U.S.C. § 455(a) on the basis that Judge Coffrin's relationship with John Opel, President and CEO of IBM, created an appearance of impropriety because IBM had a substantial interest in the outcome of the case.

Upon appeal, before the Second Circuit, appellant moved to disqualify any judge who was a shareholder of IBM. The motion was denied. Both Judge Timbers and Judge Cardamone, are stockholders in IBM. A large portion of the oral argument before the three-judge panel consisting of Judge Cardamone, Judge Timbers and Judge Meskill dealt with the question as to whether IBM was a party of interest having a substantial interest in this case. Appellant respectfully submits that substantial stockholders in IBM, such as Judge Timbers and Judge Cardamone, must under 28 U.S.C. § 455(a) and (b), recuse themselves from sitting on such a panel.

REASONS THE PETITION SHOULD BE GRANTED

Appellant has moved for a new trial because Judge Coffrin's relationship with John Opel, the President and CEO of IBM, creates an appearance of impropriety requiring a new trial. John Opel was the President and CEO of IBM at all relevant times. IBM has a substantial interest in the outcome of this case for the reasons set forth in appellant's petition of June 28, 1991.

After the first trial ended in a mistrial, Judge Coffrin barred IBM employees from sitting on the jury at the second trial. He did not disclose, however, that he had just returned from a Florida vacation with John Opel and his family a few days before he presided at the second trial which opened on February 8, 1988. Additionally, John Opel's son, Robert Opel, clerked in Judge Coffrin's Court at times during the pendency of this suit. Despite these close associations, Judge Coffrin never disclosed to RECO those associations and RECO was not aware of them until after judgment had been entered.

Actually, the first time that RECO learned of the appearance of conflict of interest was in February, 1990. At that time, RECO received a letter from Mr. Robert Opel's lawfirm (40a). The letter stated that Mr. Robert Opel had a conflict of interest in representing RECO because he was Judge Coffrin's law clerk when the case was before Judge Coffrin and that Mr. Robert Opel was the son of John Opel the former CEO of IBM.

Appellee's Brief in Opposition decries RECO's assertions about Judge Coffrin's relationship with the Opels as "personal conjecture" and "surmize" and "immaginings". However, Judge Coffrin, in his order of September 10,

1990, states that this case was assigned to the magistrate for all pretrial matters from July 13, 1982 to February 21, 1986, and therefore, the matter of Robert Opel's status was never an issue. However, a review of the record reveals the judge is in error and that it was before him on at least three occasions during this period. These occasions include:

(1) Footnote 8 of the Order (16(a)) discloses that the presiding "judge exercised his discretion in permitting a change in the location of the deposition." This decision of Judge Coffrin occurred September 7, 1984.

(2) On February 7, 1985, Judge Coffrin issued a 13-page Opinion and Order granting Defendant's Motion for a Jury Trial.

(3) There was extensive correspondence about the case between Judge Coffrin and the parties between July 13, 1982 and February 21, 1986.

It is noteworthy that at no time was there any disclosure by Judge Coffrin of his association with the Opel family. This sets this case apart from almost all cases dealing with the issue of recusal by a judge. In *In re Allied Signal, Inc.*, 891 F.2d 967 (1st Cir. 1989), there had been disclosure and wide-spread newspaper publicity about the appearance of conflicts by the law clerks. The Court found that in determining the appropriateness of a judge's disqualification due to the appearance of partiality, the party's own words and deeds may help determine the extent to which a knowledgeable observer would see a sign of partiality in a particular circumstance. The parties lack of objections for more than two

years to the judicial clerk's sibling relationship with lawyers representing plaintiffs in a highly complex mass tort litigation supported a conclusion that a knowledgeable objective observer would not have seen a significant indication of partiality in the sibling relationship. No such circumstances were present here. In *In re Beard*, 811 F.2d 818 (4th Cir. 1987), is clearly distinguishable from the case at bar because the relationship involved was that of a neighbor. A joint Florida vacation is certainly a more intimate association than merely being a neighbor. Furthermore, in *In re Beard Supra*, the meetings and relationship attributed to the judge were all disclosed prior to the meetings and were consented to by all the parties involved. In *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1306 (2d. Cir. 1988), cert denied, 491 U.S. 1102 (1989), again the appearance of conflict had been fully disclosed and known to Drexel Burnham and went unchallenged.

The test developed by the Courts to determine whether an appearance of impartiality exists is whether a reasonable person viewing the facts objectively would doubt the judge's impartiality. In *In re Drexel Burnham Lambert Inc., Supra*. The First Circuit Court of Appeals has provided some guidance:

> "The 1974 Amendment to 28 U.S.C. 445 changed the standard for recusal from a subjective one, which left the judge "in his opinion" the decision whether it would be improper to sit, 28 USC 445 (1970) to the present objective standard requiring disqualification whenever the judges impartially "might reasonably be questioned".
>
> The proper test, it has been held is whether the charge of lack of impartiality is grounded on

> facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 USC 445, but rather in the mind of the "reasonable man."
>
> *United States v. Cowden,* 545 F.2d 257, 245 (1st Cir. 1976) (citing *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98, 103 (5th Cir. 1975).

It has been found that:

"The goal of 445 is to avoid even the appearance of partiality. If it would appear to a reasonable person that judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exist because the judge actually has no interest in the case or because the judge is pure in heart and uncorruptable. The Judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. *"Hall v. Small Business Administration* 695 F.2d 175, 179 (5th Cir. 1983). Under Section 455(a) therefore "recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances would expect that the judge would have actual knowledge." *Liljeberg vs. Health Services Acquisition Corp,.* 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1987).

Clearly the purpose and goal of 28 U.S.C. 445 is to foster the appearance of impartiality:

> "Because 28 U.S.C. 455 (a) focuses on the appearance of impartiality, as opposed to the

> existence in fact of any bias of prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) Cert. den. 449 U.S. 820, 101 S.Ct. 78, 66. L. Ed. 2d 22.

Any reasonable person knowing that the presiding judge in a multimillion dollar lawsuit who vacationed just prior to trial in Florida, with the CEO of a non party whose company has a stake in the outcome of the trial of millions of dollars, would reasonably question the impartiality of the judge. Moreover any reasonable person would further doubt the impartiality of the judge who had employed the son of the same CEO as his law clerk during the pendency of the case, and who had granted a mistrial at the first trial prior to his Florida vacation, because employees of the CEO's company had been placed on the Jury by the judge over the oral and written objections of RECO.

The issue in this case then is quite clear. A reasonable person would find that IBM did have a substantial interest in the outcome of the case. A reasonable person would further find that Judge Coffrin and John Opel, the President and Chairman of the Board and CEO of IBM, had more than a casual relationship and they and their families vacationed together in Florida shortly before the second trial. A reasonable person therefore would find that Judge Coffrin, under 28 USC § 455(a) should have recused himself.

Furthermore, the reasonable person, knowing that Judge Cardamone and Judge Timbers and/or their

spouses were shareholders of IBM stock, and knowing that a threshold question in the case was whether IBM did have a substantial interest in the outcome of the case, would find that Judges Cardamone and Timbers should have recused themselves. Because the impartiality of the judiciary is of exceptional importance, granting of a Writ of Certiorari is appropriate. Upon rehearing, RECO should be awarded a new trial.

CONCLUSION

For the reasons discussed herein, RECO respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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